READINGS ON AMERICAN STATE GOVERNMENT

EDITED BY

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PREFACE

The editor offers this second volume of readings to students and to the public in the hope that it may help to make more familiar the actual working of our state governments. It is matter for regret that there is no such source of information as the *Congressional Record* affords in matters relating to the national government. So much of the real activity of the state legislatures taking place in the comparative seclusion of committee, combined with the incomplete nature and intent of the current press reports, forces the student of the real life of the state lawmaking bodies to rely upon the agencies which are coming into existence to remedy this defective publicity and observation. State documents, too, are, in the main, rather statistical and local in character. The messages of the governors are frequently, however, quite invaluable sources, while the opinions of our courts and the conferences of the bar associations are a seemingly hitherto unworked mine. To the field workers in the study of actual government — the newspaper reporters and magazine writers — the public and students owe a debt they are not always conscious of.

The editor desires to make grateful acknowledgment to the various publishers and authors, individually recognized in the text, who have generously permitted him to make use of selections from articles or works published or written by them.

The editor of the present collection desires to express his deep indebtedness to his colleague and friend, Mr. William L. Bailey, for his invaluable assistance in the preparation of this volume. Not only did he furnish many of the selections, but he counseled with respect to the general plan of the book; and, finally, the editor, called abroad on a public mission, was obliged to turn over to him the arduous task of seeing the volume through the press.

PAUL S. REINSCH

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READINGS ON AMERICAN STATE GOVERNMENT

I

THE GOVERNOR

THE POWER OF THE GOVERNOR[1]

By Governor W. E. Russell

[The power of the governor in the New England states has been affected by historical conditions. The early period from which the constitutions of these states date, and the large powers reserved to the assembly, cause the position of the New England executive to be comparatively weak. Also, because of the complexity of conditions consequent upon the industrialization of the New England states, the commission movement has been stronger there. In different parts of the country it is often the experience of a strong executive to find his projects weakened by legislative opposition or indifference. However, on the whole, the governor as head of the administrative departments and of the state government has a growing influence over legislative action.]

Gentlemen of the Senate and House of Representatives:

Profoundly grateful to the people of the commonwealth for the renewed confidence which has again intrusted me with important public duties, I enter upon their discharge by submitting to you such suggestions and recommendations as seem to merit your consideration and action.

This privilege of addressing the legislature, accorded the governor by long-established custom, is not, in my judgment, best used in a perfunctory statement of the recommendations of the various departments of the commonwealth, all of which are set forth fully in their reports to you. I believe it better to make this the occasion for a broader treatment of public questions, for giving expression to the people's wishes and wants, and for suggestion to the legislature, and through it to the public, of any policy or reform which seems to the governor wise and necessary, and for which he is ready to assume responsibility. Department recommendations can be called to your attention in a later message, if necessary,

[1] Address to the Massachusetts Legislature, January, 1892.

with such indorsement or criticism as they suggest. This cause separates more clearly the views of the executive and of the departments, and gives to both greater emphasis and responsibility. It requires the chosen representative of the people, as his first duty, to submit to you their opinion, indicated by their votes, upon such public matters within your jurisdiction as demand your attention. So will elections mean a choice between principles and measures rather than between men.

The close dependence of the people upon their state government, the great and immediate control it exercises over them and their liberty, property, and welfare, make the duty imperative of keeping that government efficient and responsible in its work, and of adopting any changes or reforms necessary to this end. With the tendency each year to increase its duties and to multiply its subjects, and thus to enlarge its power over public and individual interests, the greater is the necessity that this power should be restrained by such official responsibility as will keep it well within the control of the people and make every administrative officer answerable to them. "The first requisite of efficient administration," says an experienced writer, "is power with responsibility to a constituency which can readily call it to account." Machinery of government which worked easily and well when its duties were comparatively few and simple may be too cumbersome to meet its many and complicated duties of later days, and entirely inadequate to bring the government, now more and more felt by the people, within their control. Faithful and efficient service may make a bad system work well, or mitigate its lack of responsibility; but sound administration cannot permanently be had under such conditions, nor until the system itself is changed and corrected.

In my judgment the time has come when the attention of the legislature ought to be directed to the executive branch of our government, to the great increase of its duties, the lack of uniformity or system in the organization created for their discharge, and its entire absence of responsibility, except in the high character and conscientious service of officials in its various departments. My criticism is not of officials, but of a system; and the test of that system is not the faithful work which they have done, but the unfaithful work others might do without adequate responsibility to call them to account. If danger lurks in the system, if it can permit arbitrary acts without control, misconduct without correction, or official administration without responsibility, it is wrong.

A year ago in my inaugural address I briefly considered this subject. The experience of the year has strengthened my conviction upon the views and recommendations then expressed. As the subject has been constantly before the people in the meantime, by executive action, debate in the legislature, and discussion through the press and in the last political campaign, and the people may fairly be considered to have formed and expressed their opinion upon it, I deem it my first duty to urge upon you a thorough examination of our methods of executive and administrative

work, and the adoption of such changes as will bring into it complete responsibility to the people, and will simplify machinery at present complex, without system or uniformity.

A brief examination of the gradual but large growth of executive work and executive offices in the more than one hundred years of our constitutional government is necessary for an intelligent consideration of this matter. For some years after the adoption of our constitution in 1780 there were few administrative officers to be appointed or supervised by the governor. While the constitution definitely fixed the appointment and tenure of judicial and military officers, it left to the legislature the power "to provide by fixed laws for the naming and settling all civil officers within the commonwealth, the election and constitution of whom are not in this form of government otherwise provided for, and to set forth the several duties, powers, and limits of the several civil and military officers of the commonwealth." It was not then foreseen, nor has it been at any time since, how great would be the growth of executive work, and how varied and intricate the subjects of public and private interest with which it would deal. Consequently, neither by the constitution nor by any legislative act has there been established any uniform system; but, as the exigency of the moment demanded, an office has been created, apparently without much thought of its relation to the executive machinery already or thereafter to be established. As in the multiplicity of laws it becomes imperative at last to codify and systematize them, so in the multiplicity of offices the same necessity may exist.

The growth of the commonwealth, the creation and increase of her penal, reformatory, and charitable institutions and of new subjects of public supervision or control, have compelled the legislature, under the authority conferred upon it, to establish numerous offices and departments as the necessary machinery for the administration of this work. Most of these are of comparatively recent date, created with little regard to uniformity of government or direct responsibility. There are to-day in the executive department of the commonwealth over three hundred officers, commissioners, and trustees, not including clerks and other subordinate officers, participating by statute authority in the administration of our government. There are over twenty-five state commissions (some, however, not purely executive) and more than one hundred trustees of public institutions. Whether this number can be reduced by abolition or consolidation of offices has been considered by a special committee of the last legislature, who will submit to you the result of its investigation.

In my judgment that question is rather one of detail than of principle, and by no means as important as the question of uniformity and responsibility in the administration of these public trusts. At present there is neither. The tenure of some commissioners and trustees is three years; of others, five; of others, seven; and of one board, eight. This tenure

is fixed by law, and gives the occupant a right to hold the office for its full term, in the absence of express statute provision for removal. In many of the statutes there is no such provision, and where it exists there is no uniformity. Members of four commissions and the medical examiners can be removed for sufficient cause by the governor with the consent of the council; members of eleven commissions can be removed with or without cause by the governor, but only with the same consent. Only eight officers, outside of the district police, can be removed by the governor alone, upon his own responsibility. That is the extent of his effective and responsible executive control. Five boards of trustees are removable "for sufficient cause," but without any provision as to who shall exercise this power. Of the remaining administrative boards and officers appointed for a fixed term, including the boards of lunacy and charity, of health, of education, of prisons, the state members of the board of agriculture, and other officers holding important public trusts, there is no power of removal in anybody, except by the cumbrous machinery of impeachment. More than one hundred and twenty important executive officers are thus, during a tenure of office varying from three to eight years, beyond the reach and control of any executive power. All of these officers perform public duties, expend public money, and administer public trusts. In some way they should be made responsible to the people; otherwise there is danger of friction and conflict. Arbitrary acts cannot be controlled, misconduct cannot be punished, nor can any one be held directly and properly responsible for official action.

As an illustration of our irresponsible system I again call the attention of the legislature to our method of prison management. At present the warden in charge of the prison has no power over his principal subordinates, either in their appointment or removal, except with the concurrence of the prison commissioners, with an appeal to the governor and council in case of conflict; the commissioners in charge of the institution have no power over the appointment or removal of the warden; and neither the governor nor any one else has any power over the commissioners. In case of mismanagement, inefficiency, or trouble and insubordination within the prison, such as have occurred in times past, where lies the responsibility or the remedy? In my judgment the warden should be given power over his subordinate officials, the prison commissioners power over him, and the governor power over them, and for its exercise, he should answer to the people. A bill to this effect was reported to the last legislature by one of its committees. In the house it was amended by a provision that the power of the governor should be exercised only with the consent of the council, thus destroying the most important link in the chain of responsibility, and the one which brought this executive power within the control of the people, and its exercise under responsibility to them. The bill as amended was properly defeated in the senate.

Suppose that some administrative board, within its limited authority in part to administer the people's government, should knowingly adopt a policy against the wish of the people, or against their will as deliberately expressed through their legislature, — are the people to have no control over such board or its action? Is their government to this extent to be beyond their reach?

All must agree that the safe and democratic form of government is to make these administrative officers in some way responsible to the people. This is in accord with the constitutional intent, as expressed in the Declaration of Rights, that "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them." Again it says: "In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments." In giving to the legislature authority to create administrative offices, and to fix their tenure, duties, and powers, the constitution contemplated that such authority would be exercised, with due observance of its injunctions, to make such officers accountable to the people and to preserve to the people their power over them.

How can this best be done? It is not practicable to elect them. They must be appointed; and, to be responsible to the people, they should be under the control of the elected servants of the people. They cannot be made responsible directly to the legislature, for this is expressly forbidden by the constitution. The legislature which created the office can abolish it; but responsibility dependent upon such remedy involves destruction of the administrative machinery whenever a particular administrator is inefficient or unfaithful. There remains only its power of impeachment, restricted to cases of "misconduct and maladministration in office." This involves trial and conviction upon formal charges, and requires so much time and effort that it cannot be an effective and constant means of making administrators responsible to the people.

The power of removal, as a necessity for responsible control, must then be vested in the executive department; and I submit that it can best be vested in the head of that department. Our constitution, in creating his office, declared that he "shall be a supreme executive magistrate"; and, further, "that he should in all cases act with freedom for the benefit of the public." It nowhere limits his executive supervision of executive work, nor suggests that his direct and immediate responsibility to the people should be lessened by statutory creation of departments, boards, and offices beyond his control. If they are not within his control, they are beyond that of the people.

Provisions much like ours in the constitution of Pennsylvania have been construed by her supreme court as vesting in the governor the absolute power of removal. In its decision the court says:

> The powers of the governor are never suspended. He is at all times authorized to exercise "the supreme power." The fact that an officer may be removed by the dilatory process of impeachment creates no argument against the summary power of removal by the governor. Crime, imbecility, or gross neglect of duty may demand that an officer shall be removed at once. The power to protect the people of the commonwealth by prompt action is wisely given to the governor. In giving construction to the constitution we cannot assume that he will abuse that high trust.[1]

Our constitution, framed and adopted in the midst of war, when military powers were uppermost in the minds of the people, and remaining unchanged in this respect through wars and rebellions within and without the commonwealth, gives to the governor at such times power almost autocratic. The exercise of this power by a governor accountable to the people has been ever — but especially during the Civil War, by the great Andrew — efficient, responsible, and to their entire satisfaction. It is hardly conceivable that the constitution intended that the governor, thus trusted with great responsibility and power in time of danger, should in civil administration have but little power, and be in name only the "supreme executive magistrate." I think the framers of the constitution meant that the governor should be in fact the chief magistrate, and as such should have authority commensurate with his responsibility; and this not for the purpose of giving him power, but of imposing upon him responsibility and so retaining power in the people. To them he is directly responsible for the exercise of his power, and he hardly begins his duties before he is called upon to account to them. If he cannot justify his acts, he deserves and receives their condemnation.

The council has its function in the executive government. The constitution created it "for advising the governor," not for tying his hands, not for dictating his appointments, nor for exercising coördinate and equal power with him. It creates not ten but one "supreme executive magistrate." The jurisdiction of the council was fully and ably discussed in the constitutional convention of 1853. No one in that elaborate debate claimed as part of its power the right to advise in cases of removals from office. Its only powers, as there stated and claimed, were to advise and consent to appointments, to advise in cases of pardon, to audit accounts, and to act as the supreme returning board in the election of state officers. These powers a majority of the convention deemed of sufficient importance to justify the continued existence of the council.

In appointments to office there may well be a confirming power. It is approved by an experience of more than a century in national and state government; it affords an opportunity to correct mistakes, and to defeat

[1] Lane *vs.* Commonwealth, 103 Pa. St. 481.

any improper or personal influences governing an appointment; but it still leaves to the executive a field for selection practically unlimited. If not abused and made a power to dictate, it does not infringe upon executive responsibility. Whether this power can better be exercised by the senate, as in the national government and in many states, or by the council, does not seem to me of the greatest importance; nor does the question whether the council itself shall remain or be abolished, although in but three of our forty-four states is there an elected executive council. But whether power to remove shall be shared by the council is of great importance and vitally affects executive responsibility. This power is necessary for proper executive control. If not intrusted to one alone, either its efficiency is lost or greatly impaired by divided responsibility. Such divided responsibility, or no responsibility, is the system of executive management established in this commonwealth wholly by statute law, mostly of recent enactment. Experience has shown as practical results of such a system:

First. That neither the governor nor the people through him have any adequate power over the executive departments, of which he is the head, but his power is practically limited to suggestions, advice, and appointments to fill vacancies.

Second. That over many of the departments and executive offices there is no power of control in any one.

Third. That the power of removal and so of control usually requires for its exercise a formal trial upon specific charges and proof of absolute malfeasance in office.

Fourth. That an officer of an important public department, accused of official misconduct which, in the opinion of the governor, requires his removal, may remain in office without the confidence and against the will of his executive chief.

Fifth. That a member of an important commission may hold his office indefinitely after his term has expired, without appointment and without the approval of the governor.

Sixth. That nominees of the governor, beyond criticism and objection, may be refused confirmation, for the sole and declared purpose of holding in office men whose term of office has expired.

Seventh. That with the present limitations upon the power of removal, the power to confirm can always be used for this purpose, and successfully in every case of an expired term.

I state these results of our present system not to discuss here executive action in any particular case, but because I believe all can agree, whatever their opinion in such case, that a system which can produce such results is without proper responsibility, and ought to be so changed as to give to the chief executive power that shall fix upon him full executive responsibility.

I am confirmed in this opinion by the established and nearly unbroken

practice in the national government for more than a century, by the full recognition of this principle in modern municipal government, by its adoption in the executive system of other states, and by its indorsement alike by the student of government and by those who have had practical experience in its administration. The Constitution of the United States, vesting in the President the executive power, gives to him the power of appointment "by and with the advice and consent" of the Senate, and is silent as to the power of removal. The same phrase and the same silence are found in the constitution of our commonwealth. The first Congress, in establishing executive departments, expressly conferred the power of removal upon the President. In the debate upon that question, Madison, one of the framers and expounders of the national Constitution, declared its purpose as follows: "It is evidently the intention of the Constitution that the first magistrate should be responsible for the executive department. So far, therefore, as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country." The act conferring this power was carried in the Senate by the casting vote of Vice President Adams, who gave at length his reasons for his vote. Speaking of these, his grandson, Charles Francis Adams, writes: "These reasons were not committed to paper, and can therefore never be known; but in their soundness it is certain that he never had the shadow of a doubt. His decision settled the question of the constitutional power in favor of the President, and consequently established the practice for the country which has continued down to this day." He adds: "All have agreed that no single act of the first Congress has been attended with more important effects upon the working of every part of the government."

The policy thus established remained unchanged down to 1867, and gave to the President unlimited power, directly or indirectly, to remove all subordinate officers, now numbering more than one hundred and twenty thousand. In that year, owing to a conflict between the President and Congress, an attempt was made to restrict his power by the passage of an act of doubtful constitutionality, requiring the consent of the Senate to removals from office. That act was greatly modified during the next administration, and was finally repealed in 1887, after it had long ceased to have any active operation. I do not believe that the people would now permit the hands of their President to be tied, and executive responsibility to be divided and lost between him and the Senate.

The same principle has been successfully applied to municipal government and is strongly indorsed by municipal administrators. I have already quoted the well-known views of ex-Mayor Low of Brooklyn to this effect. Equally emphatic is the opinion of ex-Mayor Hart of Boston, who says, in a recent publication: "It is not certain that the mayor should have absolute power of appointing his subordinates or any other public officers. The power of removal should be vested in the mayor."

An able commission appointed in Pennsylvania in 1878 to devise a plan for city government, reporting in favor of this principle, said:

> It is self-evident that the affairs of government cannot be well conducted unless there is an executive head upon whom responsibility therefor is imposed. It is equally clear that such responsibility cannot be exacted without the grant of corresponding power. . . . It may be said that it is dangerous to clothe him with so much authority. The answer is that such power must be lodged somewhere if good government is to be attained, and wherever placed it is essentially executive in its nature. The mayor is the chief executive of the city, and therefore he is the proper officer to exercise it. Without it there can be no efficiency in the performance of his duties.

In the great cities of the country this principle has been fully established as essential for a responsible and efficient system of government. Its soundness has been repeatedly recognized by the legislature in this commonwealth in its later treatment of municipal charters, notably in the case of the city of Boston. The principle thus accepted as proper in the executive government of nation and city prevails in the executive departments of many of our sister states, which vest the removing power in the governor alone. If undivided responsibility is essential for proper government in nation, city, and other states, why is it not wise to place such responsibility also upon the governor of our commonwealth? If the principle is sound, it obviously applies to all executive power. I believe that it has been thoroughly tested and has proved to be sound, and that it best secures what Mr. Webster felicitously called "the people's government, made for the people, made by the people, and answerable to the people." Three hundred or more subordinate public officers, now under divided control or none, would thus be made directly responsible to the chief executive, and he, by the constitution, is directly and immediately responsible to the sovereign people. These administrative officers, with few exceptions, exercise their jurisdiction over the whole commonwealth. They should be responsible to a representative of the whole commonwealth, and not to a body each of whose members represents and is responsible to only a local constituency. I therefore earnestly commend to your favorable consideration such legislation as will give the power to remove all these administrative officers, for cause stated to the governor, leaving to the council the power of confirmation of his appointments.

In making this recommendation my criticism is of a system and not of officials. I recognize the ability and fidelity which our public servants, with few exceptions, have given to their commonwealth. Especially do I appreciate the unselfish, patriotic labor freely given her by noble men and women in her great work of education, charity, and reform, and for the health, safety, and prosperity of her people. This recommendation is without personal or selfish motive, and simply in the interest of efficient and responsible government. The record of my administration is proof of this fact. Of the few executive officers wholly under the control of the

governor, not one has been removed during my year of service except the gypsy-moth commissioners, and they for admitted cause. Of the many others whose terms have expired, a very large majority, though not of my political faith, have been reappointed. It is far easier and more agreeable for a public officer to have less rather than greater responsibility, and the exercise of power over offices is the most irksome part of executive duty. Such power, I repeat, "makes any man conservative; its selfish use for patronage only is fortunately sure to be both disagreeable and destructive." I am confident that you will receive this recommendation in the spirit in which it is offered, and, seeking only the public good, will give to it your careful consideration.

FOLK AS GOVERNOR[1]

By William Allen White

As soon as he was inaugurated Folk summoned the political attorneys of the railroads, whose business it was to bribe legislators, and told them that he proposed to enforce the antipass law, which had been a dead letter on the Missouri statutes for nearly forty years. This law prohibits railroads from giving passes to legislators, or state officers, or state employees. By violating this law the political attorneys of the railroads have been able to prevent any railroad legislation fair to the shippers; and, more than that, have been able to direct other legislation so closely that in times past other governors of Missouri have sent for these same attorneys and have begged them to allow a decent law to pass, so that its failure might not embarrass the party! This situation is common in American states! But Folk, having a reputation as a producer of indictments, spoke with some point and emphasis when he said that if passes were sent to the legislators, he would not bother with the legislators, but would see that indictments were brought against the offending attorneys of the railroads! Also he told them to keep away from the capital during legislative session. He announced that if Bill Phelps — one of the most notorious of the railroad lobbyists — hung around Jefferson City during the session of the legislature, something important would happen. And when Mr. Phelps had a few hours of private business in Jefferson City he reported to the governor upon arrival and told him when he would leave, and explained what he would be doing while he stayed. It was Bill Phelps who said of Senator Stone of Missouri: "Stone sucks eggs as I do, but he hides the shells." Phelps is not ashamed of his calling, and only buys when he deems it necessary. He intimates that Stone adds hypocrisy to his other shortcomings.

[1] From *McClure's Magazine*, December, 1905.

While Folk was conferring with the railroad representatives he told them that if they would stay away from the capital and call off Phelps, they might have his help to defeat any unfair measure proposed in the legislature, and he was as good as his word. Half a dozen unfair railroad bills were passed and were promptly vetoed by the governor. But while the unfair bills were killed by the governor, he gave his support to the needed railroad legislation, and for the first time since 1873 a law was passed by the Missouri legislature regulating freight rates in the state. A law was passed prohibiting railroad employers from working their employees more than sixteen hours at a time on freight runs; another law was enacted requiring corporations to give employees quitting their service a letter stating the reason the employees were discharged, thus eliminating the black list; a fair demurrage-charge law was put on the books, and railroads were compelled to stop at stations when ordered to do so by the railroad commissioners. A damage act became a law, authorizing suit for damages resulting from the death of an unmarried adult, and increasing the amount which may be recovered from $5000 to $10,000. Heretofore there had been no right of action for the negligent death of an adult unmarried person. The railroads have always succeeded in killing off legislation of this kind; the long-hoped-for law permitting plaintiffs to sue the original and connecting carriers who injure shippers by delays or otherwise was passed; as also was the law authorizing the railroad commissioners to compel the establishment of freight depots at junction points, when the commissioners decide that it is just. "Railroads" were legally defined to include street railways, and private-car companies were made subject to taxation. The work of men in smelters and reduction works was limited to eight hours. A compulsory educational law was passed. At different times, for many years, state platforms of both parties had promised these laws and the people desired them, but the reign of the railroad attorneys in Jefferson City had prevented such legislation. Government by corporation was overthrown by Governor Folk and government by the people reëstablished, simply through the enforcement of existing laws. The antipass law had been in the hands of every governor of Missouri for a generation, but as nearly all of those governors had been elected by railroad influence, they were afraid to use the club in their hand and be loyal to the people who paid the taxes.

Among other laws passed by the Missouri legislature, which had the active opposition of the corporations at long range, was the law prohibiting race-track gambling and making it a felony. The St. Louis race track, known as the *Delmar track*, was one of the most active gambling places in the country, and the telegraph companies sent the reports of the Delmar races all over the land, turning a pretty penny thereby. The track was outside the corporation of St. Louis, in St. Louis County, where the governor seemed to have no power to enforce the law. The

Delmar people kept on racing and gambling. Local sentiment in St. Louis County was with them, and naturally the local officers were in sympathy with the gamblers, and they prepared to invite all Missouri to laugh at its overzealous governor. Folk allowed their violations of the law to become so flagrant that the whole state understood the situation. He made it clear to the people that it was their law and not his which was broken, and thus, having aroused the state, he had public sentiment behind him, and he went after the gamblers. He planned his fight as a chess player lays out his game. He was told he could do nothing. Lawyers very generally agreed that the governor had no power; but Folk determined for himself that it was not only his right but his duty to stop organized crime anywhere in the state. If there should be a question as to his right to use the police outside of the city which hired them, he held that those engaged in the commission of felonies could not legally complain. No rights of theirs would be violated by police interference.

The gamblers expected him to call out the state militia, and were prepared to impeach the governor for sending the militia where the local officers had not asked for it. But one day a squad of St. Louis policemen appeared at the gates of the Delmar track and asked for admission, and, being refused, departed. That was all. The next day they appeared, asked for admission, and, being refused, walked in. They made no arrests, but stood around, and left when the races were over. The next day the same squad of policemen appeared at the gates, marched in, and at the proper time arrested the bookmakers. Then Folk's intimate knowledge of human nature came into play. Bookmakers are proud men, and are prone to glory in their impudence and their superiority to the law. So the Delmar gentry were loaded into an open patrol wagon, and, instead of being driven quickly and in a surreptitious manner to their destination, were driven at a dead walk six miles through the heart of the city to the police station, surrounded by a hooting, jibing crowd of scornful citizens. When the crowd grew tired and threatened to dissolve, the drivers of the patrol wagon, following instructions, slowed up or stopped to let the crowd regather and jeer the law breakers. The next day, when it was rumored that there would be a big raid and that the track frequenters would be haled into court, the gates of the Delmar track were closed, and have been ever since. A notice was posted on the Delmar gate that owing to the arbitrary action of the police the races would discontinue. The owners of the Delmar track represented great wealth and much political power in Missouri. They complained bitterly that the law did not permit the governor to use the police in stopping felonious violations of the law, but nevertheless they quit. The horses are gone, the bookmakers have fled, and gambling upon the results of the St. Louis races has ceased all over the United States. More than that, as one of the indirect results of this

lesson, the Western Union directors have decided to take their wires out of all race-track stations, and receive only such gambling news as is brought to them. The company will not be the partners of touts. The gamblers went before the state supreme court, asking that body to dissolve the temporary injunction secured by the chief of police of St. Louis to prevent the sheriff of St. Louis County from arresting the St. Louis policemen who appeared at the race track to enforce the law.

As soon as the legislature adjourned and left his hands free, Governor Folk set about to enforce the Sunday closing law, which has been in the Missouri statutes forty years unamended. He has control of the police boards in three first-class cities in Missouri, — Kansas City, St. Joseph, and St. Louis, — and also the control of the excise commissioners there, who have absolute power to revoke a saloonman's license at will. The supreme court had decided that the Sunday closing law was inoperative against every business except the saloon, and the saloon men could not compel other stores and shops to close because the saloons were shut up. That weapon was denied them. And when the order came to close at midnight Saturday they closed. The first Sunday a throng of drunken men and women crowded the St. Louis bridge, coming and going to Illinois, where liquor could be bought. The second Sunday the saloons closed. Then, after the custom in such cases, a few of them opened their back doors. Their licenses were promptly revoked by the excise commissioner. The throng on the St. Louis bridge was not so large that Sunday. The third Sunday — which is the Sunday when Sunday closing spasms generally cease — a few more back doors opened, and Monday morning the keepers of those places lost their licenses. There were a few convictions also in court of violations of the law. The crowd on the bridge was gone. The people were getting used to the law. And from that time on, St. Louis, Kansas City, and St. Joseph saloons have been closed on Sunday, and the excise law has been observed as well as the law against larceny or against murder. And the German-American population of St. Louis, which is supposed to be particularly obstinate in its demand for beer, law or no law, is larger in St. Louis than in any American city of its size. The German-Americans are there obeying and upholding the law. The story that they are lawbreakers is a saloon keeper's scarecrow to frighten weak-kneed politicians. Outside of St. Louis, in St. Louis County, where the amusement parks are located, the governor's display of policemen at the Delmar race track put the fear of the law into the saloon keepers and restaurant men so completely that the law is observed there strictly. The hotel bars and all drinking places are closed on Sunday in the first-class cities of Missouri for the first time in the history of the state. And to-day Missouri is probably the only state in the Union without a dead-letter law on its statute books.

And this is how it has paid: Since the election of Folk as circuit attorney of St. Louis the value of land in the state has increased 20 per cent. The annual immigration to the state has increased 25 per cent. The railroads announce that after a summer of Sunday closing the Sunday excursions into the three first-class cities of the state have increased nearly 10 per cent, showing that it pays to cater to the sober and industrious rather than to the lawless. The Sunday business of the local street cars has increased 25 per cent, and the Monday deposits in the banks of the cities have increased remarkably; while the number of arrests in the three cities, where statistics are available, has decreased 20 per cent and the Sunday arrests have diminished 40 per cent. More than this, the trade of the grocers and small merchants has increased so materially that they are making a sentiment for Sunday closing strong enough to maintain it when Folk leaves the governor's office at the end of his term in 1909. Similarly, the commercial clubs and business men's clubs in the Missouri cities have generally indorsed the enforcement of the antigambling law, on the ground that clerks and employees are no longer tempted to tap tills and gamble. A wholesome sentiment for the enforcement of law, as the sensible business thing, is growing up all over Missouri. It has its mainspring in the religious morality of the governor in his attitude toward his official duty, and it is appearing among citizens, not as a moral principle, but as a business conviction. It is making itself felt practically in politics, and the Republican state officials, who in any other state and under any other conditions might feel that party policy required them to hinder rather than help a Democratic governor, are doing all they can to help him. Attorney-General Hadley, a young Republican of the new school of politics, has been standing shoulder to shoulder with Folk in every important fight, and he deserves the highest praise for the way he has risen above partisan bias and has become a faithful servant of all the people. But for Hadley's sense and loyalty Folk might have been badly crippled.

EXECUTIVE USURPATION[1]

In his address at Columbia University Governor Hughes expressed surprise that he had been accused of "executive usurpation." He described, with perfect truth, his own course as that of a governor who had endeavored to ascertain what was best for the state, and then had publicly uttered his convictions, inviting and accepting the support of public sentiment. He added that his determination had been to have all these questions of important public policy discussed on their merits, with everything "regarded in the light of reason." By that he plainly meant that

[1] From the *Nation*, June 20, 1907. Reproduced by permission.

he had not sought to impose his will by the use of patronage or by entering into political bargains. Granting his clear and open purpose, and looking at the results achieved, it cannot be denied that he makes out a plausible case for his contention that what we have had at Albany this year has been not "government by executive usurpation" but "government by public opinion after discussion."

Pure theory is, of course, against the governor. In any strict view of the "division of powers" room cannot be found for such activities as his in directing the course of legislation. No definition of the office of governor, no written grant of power to the executive, contemplates a course like that of Governor Hughes or of President Roosevelt. It may well be doubted, however, if we have ever applied pure theory to the conduct of government in this country. If we had, we should not have been the sons of our sires. It is the merit and even glory of Anglo-Saxon political institutions that they are not neatly logical nor nicely consistent. Bagehot thanked Heaven that Englishmen were not politically lucid, and Americans come in for their share of that ascription of praise. Forcible executives have always made their native vigor felt, despite forms and precedents. Hughes is not so imperious a governor of New York as was Clinton; nor have the exploits of the Big Stick yet rivaled those of Old Hickory. Emerson pointed out the law of character, going deeper than any rule of politics, that a man of inherent capacity and springing virility can do his work easily even when apparently fettered by the oldest and moldiest conventions. They give way to his touch of strength.

Many causes seem lately to have been operative in making democracies more tolerant of the exaltation of the executive, or even eagerly welcoming it. Mr. Bryce referred to one of them in his remarks last week at Chicago on democratic tendencies. People are more and more coming to look to leaders. This does not necessarily mean the abdication of individual judgment. Least of all does it signify a hankering for a dictator or despot. Before the elections of 1849 in France an intelligent Frenchman told Nassau Senior that many farmers and peasants, and especially women, were saying: "We are tired of these assemblies. *Il nous faut un maître.*" It was a clear sign that Louis Napoleon was coming. But it is in nothing of that spirit of abasement that modern democracies are craving strong leadership. They do not want a master; they are seeking, rather, a powerful servant. What they desire is the emergence of some man who will both interpret and guide the popular will, and, by use of the powers of influential office, get that will written into law or translated into action. It does not matter greatly what the office happens to be called. The desired leader may show himself as mayor or district attorney, as governor or president; less often, as representative or senator. The essential thing is that, once the commanding quality is shown and the great public work set going, the people are certain to rise to the leadership.

There are obvious reasons why these outstanding men should nowadays so frequently be executives. The very mass of men in legislatures and Congress makes differentiation hard. Only the exceptional members show their heads above their fellows. Constituencies seem more and more inclined to be content with the services of their immediate representatives in the way of "looking after the deestricts," being reasonably honest, and voting as they should on the large questions. But for initiative and large inspiration they are now accustomed to search elsewhere. And one unquestioned function of executives gives them a great opportunity to catch the eye of the public. They have an unchallenged right, as Governor Hughes said, to "state their convictions," implying the recommendation of laws. Now this privilege, or duty, in the present state of affairs goes, as if made for it, with the peculiar enlargement of executive powers which we are seeing in our day. It enables a vigorous and clear-headed governor or president to make himself an advocate with the people, at the same time that he sees to the execution of the laws, and to put himself at the head of movements to secure new laws. In a sense this is an executive intrusion upon the province of lawmakers, but must a citizen be dumb simply because he is governor? Having been chosen directly by the people to the highest office within their gift, shall he be debarred from saying what he thinks to be for the good of the people? We see how great are the possibilities of that conceded power of the executive to "state his views" and urge them upon legislature or Congress.

If any man can draw a hard-and-fast line in these matters of executive usurpation, we should like to meet him. On second thought we should not like to meet him, for he would certainly be a pedant and a bore. The only really satisfying distinction, for the individual critic, that we ever heard of is that of the old gentleman at Washington who said that he liked to have the President interfere in behalf of what he himself wanted, but was ready to have impeachment proceedings begun when the President took the other side. In our hearts most of us come pretty near that position. There is, however, one sharp division that can be made. A governor may impose his will upon the legislature as Hill did, or Odell did, that is, by appeal to corrupt motives, either personal or political. That sort of usurpation is always to be condemned, not because it is usurpation, but because it is corruption. Between that and the method which Governor Hughes has followed there is all the difference of night and day.

GOVERNORS AND LEGISLATURES[1]

To the Editor of the Evening Post:

Sir: It is doubtful whether there has been, since the Civil War, any event of wider political significance or of more radiant promise than the renomination and reëlection of Governor Hughes. An editorial from your paper of September 16 is before me, and states the case so perfectly that I will venture to quote one or two sentences:

> Governor Hughes has discharged his duties with an eye single to the welfare of the state. . . . In the case of Kelsey he convincingly demonstrated his inflexible devotion to principle. He would not sacrifice it to immediate ends. . . . He has beaten the corruptionists and forced the legislature to recognize in himself the people's will.

The lesson here drawn is as to the power of personality and what a potent instrument it is, when embodying high moral principles, for arousing the mass of the people, when the principles by themselves would be inadequate; and secondly, as to what a splendid population it is that can be so aroused. For one, I firmly believe that the great majority of the people of the whole United States could be reached in the same way if proper means were employed.

But with the profoundest admiration and respect for Governor Hughes, it seems a duty, with an eye to the future of this country and of democracy through the world, to examine more closely the extent of his achievements. It must be confessed that these are limited to details and do not cover methods. He has beaten the machine, but he has not reached the machinery. He has shown how bad men can be checkmated, but he has not shown how they can be replaced by good ones. If he had retired at the end of this term as he proposed to do, the waters would have closed after him and the old system would have returned. If he does so after another term, or by an election to the presidency, without having widened his range, he will leave only a memory and a name.

To develop these ideas it will be necessary to take a wider view. In all the state constitutions practically the whole of government is given to the legislatures. The executive has hardly a shadow of real power. Now if there is one lesson which modern history teaches, it is that a legislature cannot govern. The Long Parliament tried it in England in the seventeenth century, probably as good a body of men as could be found in the country. Yet within ten years Cromwell turned them out of doors and established a military despotism. In the eighteenth century the French Legislative Assembly, after beheading also their king, tried to govern. The evidence seems to show that the first gathering was of as good men as France could furnish. Napoleon came exactly like

[1] From the *Evening Post*, New York, November, 1908. Reproduced by permission.

Cromwell, turned them out of doors, and attempted the conquest of Europe. Madison has left many wise sayings, but none more prescient than when, in the convention of 1787 (just before the outbreak of the first French Revolution), he declared that

> Experience proves a tendency in all our governments to throw all power into the legislative vortex. The executives of the states are little more than ciphers. The legislatures are omnipotent. If no effectual check be devised on the encroachments of the latter, a revolution will be inevitable.

The result has been postponed by the greatest material prosperity ever known in the world, but dark clouds are already gathering on the horizon.

Consider how our legislatures try to govern. When they meet in session there are two houses in each state, varying from fifty to three hundred men, all representing different districts and all precisely equal. There is nobody there representing the state as a whole or the state administration. The only duty of each member is to get all he can for his constituents, and he would be regarded as impertinent if he interfered with the schemes of any of the others. Every member can propose as many measures as he pleases upon any subject he pleases, and they are all thrown on an equal footing into a number of committees made up by the Speaker, who is elected for that purpose, at his discretion; while the legislature, with little discussion, passes what the committees recommend. It is an ideal system for corruption. It was the origin of the lobby, that is, a power which, by corrupt methods, can induce a mass of conflicting atoms to act together for private ends; and out of the lobby is involved the boss. What the government of the state is, that will be the government of the cities.

Reform of the state government must be the work of the governor. The object of the legislature is to maintain things as they are, to keep the governor in subjection, and the people in ignorance. It is curious to note how reform candidates for governor are springing up all over the country, and how promptly the people respond by their election, — another testimony to the merits of universal suffrage. But they do not know what to do, and so after one or two terms they pass on to obscurity and oblivion.

Here, then, is work for Governor Hughes, and there is not in the world a more splendid opportunity. I have always hoped that this honor was reserved for Massachusetts, but am ready to welcome it anywhere.

Entering upon the governorship in his first term, Governor Hughes took an early step in this direction. He ordered the governor's private room to be closed, and received all callers in the public hall, with spectators present. It is this, probably, which saved him from private importunities, which he might have been wholly unable to resist. Why should

he not take the next step? Instead of traveling about the state and demeaning his office by speaking at local clubs and dinners, why should he not demand the opportunity to address the people as a whole in the only place where that is possible? The governor alone represents the whole state, all of the people, and the whole administration. Why should he not have the right of speech in open legislature, accompanied by the responsibility which would offset any danger in giving him increased power? Only because the private interests in the legislature do not want him there and will not listen to any proposal tending towards it. Of course he would need very shortly to be accompanied by heads of departments, but that would be of little use while these are separately elected. One of his first moves would be to show the necessity of their appointment by the governor with its condensation of responsibility. It is this public contact of executive and legislature which is the keynote of all political reform throughout the United States. In February, 1881, a committee of eight members of the United States Senate unanimously recommended it in the case of members of the cabinet, but it is characteristic of the legislature that this has never since received the slightest attention.

Space will not permit further discussion now, but it offers the only means of averting the revolution predicted by Madison, and the disastrous advent of pacificators like Cromwell and Napoleon.

If Governor Hughes could be induced to use for this purpose the great influence which he has acquired with the people of New York, and thus set an example to the other forty-five states, he would confer the greatest benefit upon the country of any man since Washington and Lincoln, — names of what a different import!

G. Bradford

Boston, November 11

THE PARDONING POWER[1]

By Honorable John N. Henderson[2]

The pardoning power is a prerogative of sovereignty, and in England, from time immemorial, it has belonged to the crown. In this country, in all federal matters, the President of the United States holds the pardoning power, except in cases of impeachment. By the constitutions of most of the states the pardoning power is lodged with the respective governors thereof. In a few, however, as in New Jersey, Nevada, Pennsylvania and Vermont, the power to grant pardons is vested in boards, consisting of the governor and some of the heads of departments. In the majority of those states where the sole power is vested in the governor,

[1] A paper read before the Texas Bar Association, 1903.
[2] Justice of the Court of Criminal Appeals of Texas.

the law provides them with advisory boards, who investigate cases and make report of their conclusions to the executive. As a general proposition a pardon is a mere act of grace, and is not founded on any preliminary steps that furnish legal merits or a legal title (Com. *vs.* Holloway, 24 Pa. St. 210). In such cases the governor exercises the authority to grant a pardon of his own sweet will. This pardon may be either absolute or conditional, and the condition may be precedent or subsequent. If it be precedent, the pardon does not take effect until the performance of the condition. If it is subsequent, the happening of the contingency may avoid the pardon, and in such event the convict may be remanded to the penitentiary (Ex parte Wells, 18 How. (U. S.), 307; The State *vs.* Barnes (S. E.), 10 S. E. 111; Ex parte Kennedy, 135 Mass. 48; Carr *vs.* The State, 19 Texas Cr. 635). In the greater number of American states, while the authority is complete in the governor under the constitution, yet the legislature has regulated the exercise of this power by certain rules, such as publicity of the application, notification to the county authorities where the conviction took place, and a public hearing; and pardon boards are authorized to hear evidence and argument. And in nearly all the states, after the pardon has been granted by the governor, the same, together with the reasons therefor, is required to be reported by him to the next ensuing legislature.

In our own state the pardoning power is conferred on the governor by Article 4, Section 2, of the constitution, and the essential portions thereof are as follows:

> In all criminal cases, except treason and impeachment, he [the governor] shall have power, after conviction, to grant reprieves, commutations of punishments, pardons . . . provided that in all cases . . . of the commutation of punishment or pardons, he [the governor] shall file in the office of the Secretary of State his reasons therefor.

Prior to 1893 the onus of investigating all applications for pardon devolved on the governor himself, which he usually did through his private secretary or some officer in his department. But during Governor Hogg's first administration a Board of Pardons was provided by the legislature in language substantially as follows:

> The governor is hereby authorized to call to his aid for a time not exceeding one hundred days per annum two qualified voters of this state, who shall perform such duties as may be directed by him consistent with the constitution, as he may deem necessary in disposing of all applications for pardon (Rev. Stats., Art. 3582a).

Subsequently, during the administration of Governor Culbertson, at his suggestion, this act was amended by the twenty-fifth legislature (see laws, p. 49). However, the only amendment consisted in increasing the working time of said Board of Pardons to three hundred days instead of one hundred. This is all the law we have on the subject. But it has

evidently afforded the basis for a great number of pardons, as during Governor Hogg's administration he averaged something over one hundred a year, while the number during Governor Culbertson's two administrations reached over eight hundred. He explains this, however, in one of his messages, by stating that the legislature had increased the working days of the Board of Pardons from one hundred to three hundred days.

Inasmuch as the administration of Governor Sayers furnishes the last data, and indicates in full the workings of the present system, I quote from that as follows:

During the years 1899, 1900, 1901, 1902, and part of January, 1903, the governor pardoned in felony cases	763
During the same time he pardoned in misdemeanor cases	282
During the years 1899–1900 there were convicted in all the courts for felonies	3702
During the years 1901–1902 there were convicted in all the courts for felonies	3236
Making a total for the four years of	6938
Making number of felony convictions per year	1734
During the year 1899 the Court of Criminal Appeals affirmed in felony cases	211
During the year 1900 the Court of Criminal Appeals affirmed in felony cases	169
During the year 1901 the Court of Criminal Appeals affirmed in felony cases	161
During the year 1902 the Court of Criminal Appeals affirmed in felony cases	154
Making a total for the four years of	695
During the years 1899–1900 the governor pardoned in affirmed felonies	111
During the years 1901 and 1902 and part of January, 1903, he pardoned in affirmed felonies	130
Making a total of	241
Of these, for murder in the first degree, there were	42
For murder in the second degree	63
For assault with intent to murder	9
For rape	12
For robbery	12
For thefts and receiving stolen goods	43
All other felonies	60
	241

From the above table it will be seen that for each of said four years the governor pardoned nearly one tenth of all convicted felons. It will also

be observed, for said four years, that of those who prosecuted their cases to the court of last resort and whose cases were affirmed there were pardoned by the governor on an average sixty cases a year, or about one third of the affirmed felony cases.

The report I have before me does not show that any of the two hundred and forty-one convicts who were pardoned during said four years were pardoned for the purpose merely of restoring their citizenship. If these be estimated at one fourth of the entire number pardoned, which I think reasonable, it will leave as a result forty-five affirmed felons, who were the actual beneficiaries of executive clemency during each of said years. That is, more than one fourth of all felons whose cases were affirmed by the Court of Criminal Appeals received full pardon, not only restoring citizenship but remitting the penalties against them.

From this statement it is manifest that the exercise of the pardoning power has become quite an industry in this state, constantly augmenting with increase of population, and as that grows apace our prison population must continue to enhance. Now, with an estimated population in the neighborhood of three and one-half millions, the courts empty every year into the penitentiaries something like eighteen hundred convicts, while each year about that number is turned adrift to be scattered among our people.

It is, therefore, not too much to say that the present condition of things should serve to arrest the attention of every thoughtful citizen; and the subject of penology, as applied to our prison population, and the relationship of the pardoning power thereto, becomes a matter of grave importance.

Edmund Burke has said "that the whole function of government is to bring twelve men into the jury box, in order that they preserve the peace of society." If this be true, and under our system of civilization we have adopted, as a means of preserving the peace, the restraining power of government as against those who would disturb it, we should see to it that this power of restraint is properly carried out, and whatever means we have adopted should be guaranteed according to some fixed rules, which are calculated to enforce the edicts of the courts, which are intended for the preservation of society. While the prerogative of the governor, under the merciful dispensation of the constitution, should be preserved in its integrity, still this should be regulated by law, so as to be a quasi-judicial power. In what has been said no fault is to be found with the distinguished gentlemen who have adorned the governor's chair (for all of whom we entertain the greatest honor and respect); but the evil is in the system which enables influential criminals and their friends to invoke his clemency and influence his judgment upon unworthy subjects, by appealing, in season and out of season, to his better nature. Under present conditions, with so many problems continually pressing upon the executive for solution, he has but little time to devote to the matter of pardons; consequently he has to trust much to others, for the most part political friends, whom he feels he has a right to trust. Under

such circumstances, while he is perfectly aware that the pardoning power is not a matter of patronage, he is very liable to be unconsciously misled and deceived, more especially as his humanity is appealed to; and in his anxiety not to disappoint friends or to appear stolid and indifferent to the pleadings of mercy, he may, for the time, be too prone to forget that larger interest which the public sustain, and which depends on the enforcement of law as administered through the courts. Under the stress of importunity, no doubt, governors of this state in the past, responding to a humanitarian sentiment, have used the pardoning power as a mere perquisite, — an act of grace on their part, unconsciously, it is true, but still bearing its baneful effects to the body politic. Those of us who pretend to any knowledge of the science of penology or the philosophy of punishment know full well that when an influential criminal (by this is meant one who is able to employ the best of counsel) is brought before the courts and is tried by a jury of his peers and is convicted, and the judge refuses him a new trial, he must, as a general proposition, be conceded to be guilty of the offense charged against him. If beyond this he has prosecuted an appeal, and the state, notwithstanding all the technicalities and knotty intricacies of the law, succeeds in the court of last resort in securing an affirmance of the sentence, he could scarcely be regarded afterwards as an innocent man, the victim of unfairness. On the contrary, as a general rule, we know that his sentence is much lighter than he deserves. However, in such case, the law has been put to a supreme test, and is in a measure vindicated. But what must be the feelings of that community, after the law has thus triumphed, to see the felon, before he has even darkened the doors of the penitentiary, suddenly, without warning, turned loose amongst them, through the pardoning power. No prosecuting officer in this state but knows that in bringing an influential criminal to punishment he must have in full measure the moral support of the community, and if this is driven away or rendered powerless by executive interference with the administration of the law, he cannot secure convictions. After one such experience in a community, when the district attorney again calls on good citizens to render him their moral support, men say: "What is the use? If he is convicted, the governor will pardon him, and we cannot afford to antagonize the defendant and his friends in an effort to punish him, which in the end must prove futile."

Thus, as it has often happened, by the injudicious use of the pardoning power, the law is stricken down in its own sanctuary, and is rendered powerless for the protection of society by so-called executive clemency, which, no doubt, is too often extended for no cause that ought to appeal to the executive head of the state, who in this regard is made the guardian and protector of all the people. This may be termed mercy to the individual, but it is an outrage inflicted upon the people at large. It were far better if the executive would blazon over his door, "Let the law take its course, though the heavens fall," than that he should, out of

pseudosentiment, listen with fervor to the pardon seeker, no matter how potent may be his influence, unless he comes with clean hands and a strong and honest cause, based on something outside the matters involved or which might have been involved in the trial.

Again, the certainty of punishment is said to be, and no doubt is, a strong deterrent to the commission of crime. To let it once be known that after an influential criminal has been encompassed in the toils of the law through the machinery of the courts, he has a sure refuge in the pardoning power of the executive, then there is no law and no restraining force. On the contrary, the courts have been trodden under foot and the majesty of the law has been insulted; and men lose respect for the law which the courts are incapable or powerless to enforce. Be not deceived. You cannot sow the wind without reaping the whirlwind. No more can you override the courts without breeding disrespect for law; and in these times of trouble nothing should be done to invite the rule of the mob.

Do not misunderstand me: I am not opposed to the exercise of the pardoning power. On the contrary, I believe it is a high and sacred prerogative, and it should be preserved, in all of its purity, to the executive. But I believe it should be regulated by law, and on terms of equality to all men who are so unfortunate as to become encompassed in its toils; not to the rich, the influential, alone, but equally to the poor and friendless. Like some treasured Damascus blade, the pardoning power should be kept sacredly in its scabbard and should only be unsheathed on exigent occasions, for it is the sword which cuts the Gordian knot of the law and renders its edicts powerless.

In order to guarantee the efficiency and usefulness of the pardoning power, I beg to lay down these propositions for its administration:

1. When a pardon has been applied for, after the same has been filed with the Board of Pardons, due notice should be given by said board to some county official of the county where the party was convicted; and this notice should also be published in some newspaper at the county seat of said county.

2. The Board of Pardons should be made a creature of law, with prescribed rules of procedure. There should be an open hearing of the cases, with opportunity to introduce evidence and argument on both sides. As a general rule, the application for pardon should be founded on something transpiring since the trial, or, if occurring before the trial in the courts, failure to discover same must not have arisen from want of diligence.

3. Said board should not be authorized to act as a court of review to pass upon the correctness, regularity, or legality of the proceedings in the trial court which resulted in conviction, but should confine itself to a hearing and consideration of those matters only which would properly bear on the propriety of extending clemency by the governor in the case.

4. It should also be provided that no member of the legislature,

penitentiary official, or other public official should apply for a pardon on behalf of any convict.

5. It should further be provided that no person applying for a pardon in favor of a convict should receive a greater fee than one hundred dollars; and in every case the person applying should be required to file an affidavit of the amount of his fee.

6. The findings of said board should be filed with the governor and should afford the basis of his action in extending the pardon, though, under the constitution, he might not be circumscribed by the reasons furnished. In all cases he should be required to file a copy of the pardon with the Secretary of State, and this should be published in the county of the residence of the convict.

7. While under the law as it now exists it seems the executive may grant conditional pardons, I believe there should be a definite statute on the subject, giving the governor authority, on the recommendation of the board, either to grant paroles or conditional pardons based on certain regulations prescribed by law. In regard to this latter proposition I would remark that a parole system has been found to work well in a number of other states where it has been tried. And it occurs to me, inasmuch as by our system of pardons and discharging convicts whose terms have expired, we are annually turning loose a population on the body politic more or less viciously inclined, it would be a better policy, so far as the welfare of the state is concerned, to hold some restraining power upon this population. For instance, where a party is sent to the penitentiary for some felony and his punishment fixed at five years, on a record of good behavior the board might be permitted to recommend his conditional pardon at the expiration of two or three years. He could thus be turned loose on his good behavior, with power on the part of the governor, under certain rules, to restore him to the penitentiary if he violated his parole. This at least would tend to make a good citizen of him, whereas, under our present system, there is no such guaranty, and as a result many convicts who have served out their terms or been pardoned are being convicted for other crimes and returned to the penitentiary.

If the above rules are adopted and enforced, there will be more equality before the law. The poor man will then have as good a chance at a pardon as the rich and influential. There will be more certainty in results reached, and consequently more respect for law. The governor will be protected against the invasions of the pardon broker, while the courts will be conserved against executive encroachments. At the same time, under the parole system, a premium will be placed on the good conduct of the convict when he has been turned loose, which will operate as a safeguard to the community; and it will follow inevitably that there will be a betterment in the administration of the criminal law through the courts, and a general uplifting of society throughout the length and breadth of the state.

THE ENFORCEMENT OF LAW[1]

By Governor J. W. Folk

In the state of Missouri we have now in operation what is called the Missouri idea, — the idea that public officials should answer at the bar of public opinion for all official acts; that the man who, in his official life, betrays his people is a criminal; and that laws are put upon the statute books to be observed, not to be ignored.

In proportion as the average morality in a state is strong, just to that extent is the state great, and good government reigns. Laws that are put on the statute book must be put there for some reason. Laws that are not enforced add just so much to good government as sores do to the strength of the human body.

Many men observe those laws which they like and disregard those laws that are obnoxious to them. The trust magnate looks with abhorrence on the pickpocket who violates the larceny statutes, but thinks that he himself has a perfect right to break the laws against combinations and monopolies. The burglar detests the lawbreaking of the trusts, but thinks the law against housebreaking unjust and unfair. The boodler considers the law against bribery as an interference with his personal rights, but he demands the rigid enforcement of the law against the man who steals his property. The dramshop keeper thinks the law against murder is a good law, but the law requiring his dramshop to close on Sunday is Puritanical and tyrannical and a "blue" law. It has been my experience that any law looks "blue" to a man who wants to break it.

So it goes. Men obey the laws that restrict the other fellow, but laws regulating their own conduct they regard as interfering with their rights. If every man were allowed to judge for himself and to like those laws which are good and disregard those which are bad, as he sees them, we would have anarchy. There would be no laws at all. That is the spirit of the mob which hangs a man because it thinks he is a bad man. Yet if each individual were given the right to put out of the way every person that he thinks is not a good citizen, no man's life would be safe. The only safe test is to enforce every law upon the statute books. If the law is a bad law, the remedy is to repeal it, not to ignore it.

No official has a right to ignore any law. It is not for him to say whether the law is good or bad, but it is for him to enforce it as he finds it on the books.

A great deal has been said in Missouri in the last few weeks about what is commonly called the "lid." The "land of the lid" means the "land of the law." When people talk about taking off the "lid" on Sunday, they mean to let the law be violated with impunity. They mean for officials to violate their oaths of office and to cast away the obligations

[1] From an address to the Kentucky Bar Association, 1905.

that they took when they entered office. If we take the "lid" off of the Sunday law, can we not with equal propriety take the "lid" off of the larceny statute and off the murder statute? Then we would have anarchy.

The greatest danger to any government lies in the fact that laws that are made are not enforced as they are made. There has been entirely too much making of laws to please the moral element and then allowing the laws to be ignored to please the immoral element.

My convictions may be termed idealistic, but ideas and ideals are the life of a free people. We are made and governed by the things we cherish. The public life of a nation is but the reflection of its private life. No government was ever better than the people made it, nor worse than they suffered it to become. Without moral vigor material strength counts for nothing, resources count for nothing. The Empire of Rome built highways and constructed splendid cities, while her civilization was declining. She erected barriers against the barbarous hordes who surged over them, while the strength of Roman character ebbed away, and when that was gone there was nothing to defend, there was nothing to conquer.

There is an old tale of an Eastern king who caused a magnificent palace to be erected as the abode of his majesty and power. Stone by stone the structure grew and the heart of the king swelled with pride. One morning the palace was found in ruins, — not one stone stood upon another. "What great treason has been accomplished here?" the king exclaimed; and a price was set upon the head of the traitor who had destroyed the abode of majesty. But a wise man of the court said to the king: "Great master, there was no treason here. Your house that was great and mighty has fallen down because the builders used mortar without sand, and the work that they did has come to ruin."

So with the state. External grandeur counts for nothing if we ignore those vital principles of morality and of law that give life to a state. We may count our wealth as the sands of the sea; the domes of our capitols and the spires of our churches may pierce the sky and glitter among the stars, yet all must fall, all must crumble away like the palace of the ancient king, unless it be welded together and strengthened by those moral principles that are the foundation of an enlightened citizenship. When corrupt principles are allowed to influence public acts, and selfish considerations deter the people from upholding the laws and from giving their best interests to the public good, we are making mortar without sand.

LAW ENFORCEMENT IN KENTUCKY[1]

By Governor Augustus E. Willson, of Kentucky

The real test of strength of the law-and-order sentiment of a community is not in the acquiescence of a mild-mannered race, but it is when strong, hard-headed, determined people, with their feelings and passions excited so that disorders result, finally put down their revolt and restore order and safety. From the earliest times our race has never been either timid or easy-going. It has always been strong, determined, earnest, hard-headed, and fearless, and it has been the rule and not the exception for every man to fight against what he believed to be wrong. There are many common instances of what any typical American will resent with violence, regardless of law. He rarely sues out a peace warrant against a man who calls him a liar. Generally our people have continued an even, steady march, holding strongly to the law; but it is inevitable that such a people, from time to time, should have storms of excitement and passion, local outbreaks, and times of lawlessness.

The Ku-Klux had a large membership in Kentucky, and for a time established a reign of terror, making many afraid, and it deprived people of their liberty and of the protection of the law; but Kentucky soon made it a felony for any two or more men to band or confederate together to threaten or intimidate any person or injure his property. Later the organized tollgate raiders stopped the collection of tolls and destroyed large investments in turnpikes. The feuds in some counties are not strange in a race which for generations kept up the feuds of the Orangemen and Catholics, and the Scotch and English. But there is strong evidence of the Kentuckian's devotion to law and order in the frequency of the verdicts of mountain juries, inflicting punishment for taking life whenever they have a chance.

The tobacco war in Kentucky was one of the most dangerous disorders that Kentucky has known. I shall review briefly some of its principal incidents.

In a message to the legislature in January, 1908, I said:

> Throughout most of the year law and order, peace and good will, have prevailed throughout the commonwealth. . . . The pleasure which this peaceful and prosperous condition brings to the hearts of all good Kentuckians makes it all the more painful for the governor to speak of the renewal of serious lawlessness and disorder in parts of the commonwealth, which have lately broken our record of peace and order, alarmed and distressed our people, destroyed millions of dollars of values of property, . . . injured the good name of our commonwealth, and caused alarm for the security of life and property and the protection of our liberties, dearer than life or property, the news of which, carried to the ends of the earth, will drive customers from our markets,

[1] From an address to the American Bar Association, 1909.

turn desirable immigration to other states, and plant anew in the breasts of thousands of law-abiding men and women, who love peace and dread lawlessness and disorder, the wish to move to states where the law protects all alike.

We have severe laws against trusts, ample to suppress and punish all combinations against the farmer; and we have a statute which makes it lawful for farmers to pool and combine against the buyers, when it is unlawful for them to combine against the farmer. Our courts are in operation to protect the rights of all and punish infractions of the antitrust laws. This great conflict of interest between the parties interested in millions of dollars' worth of tobacco has excited a great deal of hard feeling, angry controversy, and personal threats of parties on either side against the other; . . . and finally these proceedings have culminated in raids of large armed bands going around by night and destroying the peace and security of the commonwealth, and the partisanship in these matters has paralyzed some of the courts and officers, and the grand juries and petit juries, so that the grossest violations of the law go unpunished and the people's liberties are destroyed, with little hope of redress. . . .

In December, 1905, in Todd County, in the circuit-court room, packed by excited men, a lawyer declared that if they did violate the law, they ought not to be punished, and would not be prosecuted while he was commonwealth's attorney; and the very next night one tobacco factory was burned and another set on fire, and the following Monday night a large band of armed and masked men held up a railroad train and searched it for tobacco and dynamited a snuff factory, and although the circuit court was in session, with a grand jury impaneled, no one was indicted or punished.

Early in 1907 men behind these schemes formed, for the first time, a general organization in sufficient numbers to intimidate all not similarly organized, and early in the year a large armed band of masked night riders made a very ugly sample of the old country's border raids on the town of Princeton. Later there were other disturbances, and finally it culminated in the raid on Hopkinsville, about two o'clock on the morning of December 7, by a small army of several hundred mounted men, armed and masked, who, under the cover of darkness, without warning, fell upon the city and overwhelmed and intimidated the people of a whole city. Their deeds in Hopkinsville are known of all men and have done incalculable harm and brought great shame upon the commonwealth, but not one has yet been punished, and for the time there was almost paralysis in business.

A similar raid of armed and masked men was made on the large town of Russellville, and it was seized, much valuable property burned, and people shot and wounded, and a whole region again intimidated. In Bracken County there has been a state of terror, oppression, and intimidation for weeks.

In large districts the people are deprived of the protection of the law. Lawless men have been constantly ready to break out in several counties, and the people of Kentucky are brought suddenly and squarely to face the question, whether the laws of more than two million or the violence of a few hundred shall prevail.

There can be no doubt of the final result. Anglo-Saxon common sense and law always win in time. Our people had better lose not only part of the value of their tobacco, but even their farms, than their liberties, and presently there will be a great reaction in public opinion. Judges and prosecuting attorneys,

who fail in the critical moment, will have to answer for their neglect of duty, and finally everything will straighten out; many who are most guilty will go to the penitentiary, and the rule of law and order will be resumed everywhere.

The executive will faithfully uphold the law, but it is the people's law and its strength is in the support of the people for their own laws.

The message advised the enactment of a law for change of venue, in the investigations of such crimes, from the seat of trouble to other counties, so that local violence would not hinder indictments and verdicts; but the general assembly took no action.

The armed men who raided Hopkinsville, after shooting up the town and terrorizing citizens, burned property valued at $200,000. A great deal of ability, time, money, and work were surely necessary to get this regiment of men from different counties so well organized, drilled, and trained, and there can be no doubt that the work was done and money furnished by the tobacco associations.

One of the judges of the court of appeals suggested inviting the tobacco growers and buyers to a conference at the governor's office, to inquire into the cause of the disorders. He was asked to write out an invitation to meet with the governor, and it was prepared by him and issued. Some two hundred tobacco growers, a trust representative, and a few tobacco buyers attended. The governor, in opening the meeting, said that all sides should be heard; that he was neither a tobacco grower nor buyer, and that his only interest was to preserve the peace; that no one disputed the fact nor could question that the night riders were guilty of the felony denounced by the Ku-Klux law, and of the felonies of arson and assault with intent to kill, and that they are cowards and criminals, and he added:

I have invited no law breaker to this conference. I will have no conference with him. For him there is the law, nothing less and nothing more. The law of two million people cannot be defied by five hundred or five thousand or fifty thousand men. It must be obeyed. It does not request; it commands, and will enforce obedience. The poorest man, single and alone, may demand the whole power of the commonwealth, if necessary, to protect his constitutional rights. The law must be enforced. I believe the people will stand by the law, for the strength of the law is the people, and the strength of the people is the law.

The justice, a very popular and attractive man, spoke of the law and the duty of the people, but toward the end of his address said:

Governor Willson is the governor of the people, but as governor he cannot execute a single law without the people. The greatest power in the land is in the jury box. The governor and all the commonwealth have not the power of twelve men on a jury.

You had better burn every barn in the commonwealth than, with uplifted hand, in the jury box, profane your duties and render an unjust verdict in the name of the law. The people of Kentucky have it in their power to exclude from

the commonwealth any company, concern, or combination that seeks to control prices against them. In fact, they have the power to make fines like that with which the Standard Oil Company was visited, look like the proverbial thirty cents.

And then he added:

I do not believe in soldiers, but I indorse every word uttered by the governor about upholding the dignity and supremacy of the law. But I have never seen the time when you could push an idea through an Anglo-Saxon's head with a bayonet.

At this, the suppressed excitement broke out in wild applause. This speech was a profound surprise to me, and if it had been left unanswered, there would have been an outbreak of crime and violence in a dozen counties within twenty-four hours. I use the newspaper report of my reply:

The moment he concluded Governor Willson rose and, hardly waiting for the applause to end, began a reply in which he objected vigorously to the statements in regard to the soldiers and scored the growers for cheering such sentiments. "Why do you cheer, when it is said that soldiers should not have been sent to Hopkinsville? Do you recall that two weeks ago armed and masked criminals rode into Hopkinsville, shot into innocent homes, and burned up property, and that up to this day not a man has been arrested? The law of the state must and will be supreme. These soldier boys are Anglo-Saxon too. I am an Anglo-Saxon myself, and so are you, and I know that down in your hearts you want the law enforced. If necessary, we will call on every one of you to shoulder a musket and help enforce it, and you will comply, and it is wrong for other sentiments to be expressed and for the high judges of the state to advise anything else.

"Every outbreak decreases the value of every acre of land in Kentucky and endangers the liberty of every man who is cheering these utterances, and unless suppressed, the state will be abhorred as a place unfit to live in. The liberty of the people is worth more than all the tobacco that ever was or ever will be raised in Kentucky. Sometimes the only way to force the idea of law and order through an obstinate Anglo-Saxon's head is by the bayonet. The soldiers were necessary and had been called for by the county officers and great numbers of people who had reason for their fears, and all the troops needed will be ordered on duty whenever and wherever needed, if I have to call out the reserve and bankrupt the state treasury. When an Anglo-Saxon takes up arms against the people's law, the arms of the law will put him down. Violence and intimidation, night riders and so-called 'peaceful armies' will be suppressed relentlessly, and all the power of the state government will be used to do it."

The representative of the tobacco company, the chief buyer, made a short address, which gave promise of an understanding being reached between the rival interests, and committees were appointed, and the negotiations brought on by this meeting finally ended in a settlement in which the tobacco trust and the growers' pools — the two trusts — agreed on a very good price for the pooled tobacco, to their mutual satisfaction.

Such a sale of the pooled tobacco would, in my judgment, never have been made but for the conference. There would have been strife, bitterness, and violence, which would have ended all chance of agreement upon good prices. But the result has not helped the cause of liberty or law and order; indeed, it has strengthened the hands of the two combinations, the tobacco trust and the farmers' pool, and the independent buyers and the independent growers, who had not already sold, have the "bag to hold." The conference thanked the governor, and

Resolved, further, That this meeting of Kentuckians heartily indorses the purpose of Governor Willson to discover and punish the perpetrators of the recent outrages in western Kentucky and especially at Hopkinsville; and we do with all possible earnestness condemn those and similar outrages . . . and hereby pledge to Governor Willson every assistance at our command, including the power and influence of the organizations which we respectively here represent, in his efforts not only to restore but to permanently maintain peace and order throughout Kentucky.

This resolution of the meeting, composed almost wholly of tobacco farmers, following so quickly the rebuke of the fierce applause of the speech against the use of troops to put down the armed attacks on the peaceful people, was very gratifying proof of the justice of the governor's confidence in the devotion of the people of Kentucky to the law.

Not less effective than the troops was the organization in several counties of law-and-order leagues, and finally a state league, enrolling a very large number of fearless and determined men, who were organized into companies, and money was subscribed to pay all of the expenses. These leagues helped patrol the roads and guarded their neighbors. There were also many instances of individual heroic defense of homes and property by men and even by women against the night riders. For months hundreds of homes were guarded by their families, who kept night watches under arms. The dangers were often as great and the anxieties as thrilling as those which the pioneers had to endure from the Indians.

Then followed many acts of oppression: plant-bed scraping, barn burning, burning railroad stations, threatening, whipping and beating white citizens, and destroying property in different parts of the state by organized bands. On the application of citizens who were in danger, small detachments of soldiers were sent to several counties, and shipments of state guns and ammunition were made to responsible parties in a great many places, and detachments were on duty with Gatling guns at Hopkinsville and Lexington. Five hundred dollars, the largest reward authorized, was offered for the conviction of each of the men guilty of the raids and intimidation in all of the troubled counties, and to every man who should give advance information of contemplated raids.

A succession of outrages, forcible seizures of tobacco, and whipping more than fifty white men went on for months in Bracken County.

Tobacco buyers were whipped by night riders in Lyon County at the town of Kuttawa, and many people sold their property and left the state; the newspapers reported that fifty moved to Texas in a single day. The disorders in western Kentucky continued, and further detachments of militia were sent there.

Two hundred masked men seized on the town of Dycusburg. Two men and a woman were beaten and a tobacco warehouse and a distillery burned. This outrage was very brutal in its character. The raiders left their horses at the edge of the town, and, after cutting the telephone wires, began to shoot up the town. It is estimated that about two thousand shots were fired. The first victim was unmercifully whipped with thorn switches. They then fired into a family home, dragged the owner out and whipped him until he begged for mercy, and when his wife tried to rescue him, she was beaten.

In Nicholas County, Hiram Hedges, a poor farmer, was called to his door and murdered in cold blood before the eyes of his wife and children, by a band of night riders. Hedges, before he was shot, threw himself on the mercy of the men and promised to comply with their wishes and dig up his plant beds if they would leave his home, but they paid no attention and shot him to death. Two men identified by the widow were arrested and released on examination by a county judge.

Farmers all over the state were warned not to raise a crop in 1908. At Paducah the circuit judge, who acted with great courage and vigor throughout all of these troubled times and impaneled a grand jury to investigate the raids in Marshall County, received long-distance telephone threats of violence.

A company of mounted infantry was put on duty as a night patrol of the roads in the counties of Mason, Bracken, Harrison, Grant, and Owen.

There is not time to detail the many wrongs done. Through all the story of violence it was plain that every crime was part of a plan to make all tobacco growers afraid not to pledge their crops to the association.

It is of some interest to record the night-rider oath, which was in these words:

> I, ——, in the presence of Almighty God and these witnesses, do solemnly promise and swear to become a member of this order. If I should betray this order in any way by signs, acts, or writing, or cause to be revealed the secrets of this order, I shall have to submit to the penalty which is put upon me, which is death. I solemnly promise and swear that I will obey all orders which may be given me, and I will go at any time they may call upon me unless I or my family are sick.

A member of the band testified that he went with the night riders to the homes of various men who were forced to come out and take this oath of membership on their knees.

During these occurrences the governor was receiving from men and women all over the state the most earnest and touching appeals for help

and protection against the night-rider outrages, threats, and crimes. I quote from a letter from one lady, which is a fair sample of many:

> But I feel like this terrible mental strain on account of threats and also actions from what is called night riders, I cannot endure much longer. When we lie down at night we do not know whether it is for the last time, or whether all our property will be destroyed before morning. My husband has had a written notice that his house and barns would be burned and his hide split, and last Friday night his old blind mother, eighty-four years old, had all of her tobacco destroyed by them; and last summer they would not let her wheat be threshed, and notified the man that did thresh it, that they would blow up his machine with dynamite, if he went into her field, until it was nearly ruined. The torture that the poor country people are suffering is worse than death. What can you do for us? . . . . It seems to me half the people of Kentucky will be crazy before July, and so much property destroyed.

The governor is, by law, authorized only to employ two detectives and to expend not exceeding $3000 in any year for investigations; this was entirely inadequate for investigating a state-wide conspiracy like this. A very serious hindrance to the state administration in putting down these disorders was due to the fact that some members of the general assembly were in sympathy with lawlessness. There was an opposition majority in both houses, and part of the general assembly was opposed to law-and-order measures.

During all of this time it had been impossible, generally, to secure any indictment by a grand jury against the night riders in any but two or three of the counties, where a brave circuit judge used all the power of his great office to suppress lawlessness, as in Calloway, where fifty-two were indicted, while other officers, professing virtuous sentiments, connived at packing the juries with night riders, so that the trials in some courts, where men were plainly guilty, were farces.

For nearly a year the militia — mounted infantry — patrolled large districts of the state. It was hard service, — detachments riding long hard rides every night, through the winter and inclement spring, lonely all-night patrols through hostile neighborhoods. And then the state law-and-order league, by resolution, demanded that the governor should call out the whole militia force of the state and post men in every county, and reproached him for not taking more active measures.

The whole force of militiamen on guard in the state never exceeded three hundred soldiers, whose patrols covered many counties and many thousands of square miles and thousands of miles of roads. They were at all times under strict orders not to parley or compromise with the lawless in any way, but to attack them instantly wherever they found them in masked bands, taking every care to be certain that they were night riders, so that no innocent persons should be attacked. The lawless men, ordinarily brave enough to fight their numbers or more than their numbers, became panic-stricken at the idea of being killed in masks, and,

even in large bodies, they would not venture to ride the roads patrolled by a squad of only two or three militiamen.

Nothing could more forcibly illustrate the power of the sentiment of the people for law and order than the panic which overcame the lawless bands in the face of the power of the state, when three hundred militiamen absolutely held back and drove to cover this great criminal organization of ten thousand sworn night riders, with their many sympathizers. The night riders claimed that they had thirty-two thousand members, but the better opinion is that there were from eight to ten thousand.

To make the policy of the state authorities known, copies of letters written by the governor to citizens who appealed for protection, were published, from which I give a few extracts:

I am sure that in time the people will realize the enormous loss they have sustained in money, property values, liberty, and reputation, and that presently the pendulum will swing back, with resistless power for the punishment of the criminals. . . . I have no idea whatever of coming to Hopkinsville to have a conference. . . . I cannot understand how they can think that it would be even sensible, much less necessary, for the state to negotiate with them as if they were the government of another state. The laws are in full force to protect them. The courts are open to them just as to others. The state is not asking any conference with these men — it has no more interest in them than other individuals. It will not think of conferring with them as if they were elected representatives. There will not be a thread of compromise with these flagrant crimes. No matter how long it takes, the state, with all its power, is ever pressing forward to the punishment of the guilty. . . . The trials may be temporarily delayed, some miscarry, but the law will be enforced and the criminals will be punished without any sort of compromise; and unless all violence ends at once and peace is fully restored, there will be no earthly possibility of any successful appeal to the governor to make any allowances for the crimes. They have injured the property of the people; they have destroyed public confidence and hurt the good name of the state a hundredfold more than a dozen murders committed without combination. No man could do his duty nor be faithful to the constitution and the liberties of the people who would entertain any possibility of mercy for organized crime, and there must be no possibility of mistake or doubt on this subject, and there need be no doubt or fear in the minds of the law-abiding people of the final result. When brought to face the failure of the purpose for which the crimes were instigated, it will not be long until there will be such public feeling for the prosecution that there will be no difficulty in enforcing the law, no chance for any public official, who has failed to do his duty, and no chance for any man who planned, organized, or took part in the crimes, and it will not be long to wait.

Another letter to a law-and-order organizer:

. . . I believe in organization, but there should be no use of the power of numbers to rule by force or in any way except by law, either members or those not members. The rules and contracts must be enforced by law and not in any case by private violence, and it will not be long until all men of ordinary

sense will see that one cannot win customers by threats; and several counties have suffered brutal ruffianism quite as dangerous as the Indian ravages were to our pioneer fathers, so that nobody will wish to move into these counties, and every man who loves his liberty will wish to move out. Everybody, a few days ago, was safe and happy, but everybody is now unsafe and unhappy, and not a particle of good — nothing but harm — has come of it all, and presently the people will turn and punish the Ku-Klux and there will be no mercy for them.

In a letter to Bracken County:

I have been greatly surprised at the continued reports of flagrant, open Ku-Kluxism in Bracken County. It seems that hundreds of men in so-called "peaceful armies," marching in large numbers, have visited people of their county, and even in Mason County, to compel them to give up their liberty and to obey men who have no right to force their will upon their neighbors.

The word "peaceful army" is an insult to every man's intelligence. Every marching band is guilty of felony under the Ku-Klux Act and subject to indictment, conviction, and sentence to the penitentiary, and I hope there will be no doubt in the mind of one of them that, no matter what temporary encouragement he may have had, the loss of liberties and rights will arouse the people to uphold their laws, drive the modern savages out, and demand their punishment.

I glory in the noble courage of the woman who planted the flag, the emblem of our liberties, at her door when the mob rode up to her father's home. I honor the old Irish woman who defied them all. I honor the man who, with loaded shotgun, commanded them to turn back from his front door. I wish every man to be patient and never hurt another until forced to, but I shall have a special desire to protect the man who defends his liberty, his property, and his life at any risk from these "peaceful armies" of Ku-Klux.

Before the troops went on duty there were thousands of Kentucky homes in which the men, women, and children never went to bed without fear of death, danger, and arson; yet in a few months a handful of soldiers suppressed the whole conspiracy, drove the leaders into hiding, and put an end to the rule of fear. The total expense of the militia for all purposes during these months, beginning in December, 1907, and ending this year, has been about $225,000, of which some $200,000 was made directly necessary by the night riders.

Several night riders were killed, but the fear of detection of the others caused desperate efforts, in every case, to conceal the fact of each death. Reports show that several committed suicide on account of the crimes.

A proclamation issued by the governor called upon the people to defend themselves, and told them that if they did, they would need no lawyer if they hurt anybody in defending their homes. This promise has been kept. The night riders never risked any chance of an engagement with the troops. The outrages were planned and executed in secret and under cover of darkness. No troops were ever sent except under the law authorizing the governor to order them in case of danger to life or property, but they were always sent when applied for by the public

officers, and whenever and wherever they were needed; and, in many cases, where local officers were in sympathy with the night riders, they were sent by the governor's order, without application, when it was certain that the danger existed.

The state league resolution for calling out the whole state militia was answered by saying that under the law the governor could not send any troops without information showing a necessity for them.

Under strict orders, there was no news or information given of the movements of the troops. They carried on their patrols in such a way that the night riders never knew where they might turn up or intercept them. The people's soldiers, on their part, conducted themselves splendidly under great hardships, with patience, courage, sound common sense, and unfaltering loyalty, and became seasoned soldiers fit for any duty. There was never any complaint of their behavior or performance of duty.

Prominent members of the Dark Tobacco Association called upon the governor and offered to have the lawlessness stopped if the governor would withdraw the troops and stop the investigations, but they were told bluntly that no parley would be held with them and no compromise made.

The highest reward permitted by Kentucky law was offered for information that would lead to the apprehension and punishment of every man guilty of coöperation with the night riders or of banding or confederating together to injure or intimidate others, and for advance information of intended riots; these rewards would aggregate hundreds of thousands of dollars if the guilty were exposed and successfully prosecuted.

There has been no consideration of political future or popularity nor of the wishes of the lawless, but there has been a stern, relentless, and unwavering purpose and an unceasing effort to suppress lawlessness and punish crime. It rests with the people of the commonwealth and their courts to return the indictments and punish the guilty. There will be no pardon for this offense.

This plan of action has been denounced with every form of abuse and falsehood. Many county newspapers are under the influence of the night riders, and here and there a judge or state's attorney, elected by the people and not subject to removal or correction by the governor, has faltered in his duty, and in some instances sympathized openly with the criminals. But our people are coming to their own again, and there will be prosecutions and convictions for the wrongs suffered in so great a territory and for so many weary months. I do not know any state to-day where the sentiment for law and order is more universal, earnest, and uncompromising than in Kentucky. We have the straightest typical Americans in all this land, and the best law-and-order people in the world.

While I have never faltered for an instant in the firm faith in our people, I may confess strong gratification that this faith has already

proved to be just, and that the policy of law and order to-day has the cordial approval of the people of Kentucky. I deem myself most fortunate indeed that it has been my lot to be the governor of Kentucky in these times of trouble and anxiety, and to have the faith I have had in our American people. I am entirely safe in saying that there is no issue in Kentucky upon the question of law and order; that the sentiment of the state is strong, earnest, faithful, and unyielding in favor of upholding the law, without temporizing with any form of defiance of it.

No politics were, generally speaking, injected into this contest. In some counties the night riders tried to make it a political matter and were actively helped by some politicians, but the attempt has reacted. One circuit judge, who made righteous law-and-order charges to grand juries, but made a farce of the selection of men for juries and of the trials of the night riders in his court, was defeated for the nomination in his own party convention in the dark-tobacco district. The Tobacco Association has publicly denounced lawlessness, and no candidate for office dares make any public claim or even admission that he was a night rider or a night-rider sympathizer.

So far only two men, I believe, have been convicted of night-rider crimes, each receiving a sentence of only one year, but victims of these outrages have recovered in actions in the federal court large sums in damages.

Except for the first raid at Princeton, in which tobacco-trust property was destroyed, and except one trust building which caught fire from an independent factory, there has been no injury to any of the trust's property or employees. It has never asked any protection, and all of the efforts of the night riders and the different tobacco associations have been directed against the independent farmers who would not join the farmers' pool and put their crop into its hands, and against the independent buyers and factories, who would not yield to the trust. At the end of all the trouble the two trusts, the tobacco trust and the association trust, readily agreed with each other, to their very great mutual gain and profit, and the trust got all of the pooled tobacco that it wanted, having the first choice and leaving the independent factories and buyers to get what it did not want, while those unfortunate people who cherished the liberty and the right of each man to do what he pleases with his own so long as he does not interfere with like rights in others, were ground fine between them.

This tobacco trouble is as old as the growth of tobacco. Fiske shows that just such troubles existed in Virginia in early colonial times, and they are not new to Kentucky, though they have never before resulted in such widespread crime and intimidation.

The people of Kentucky owe a great debt to the circuit judges, county judges, commonwealth's and county attorneys, who never faltered even when the storm was darkest, but kept the faith and fulfilled their duties

regardless of personal safety or political chances. These men, with whatever party they may affiliate, have shown their title to the confidence of their people. But more than all, I render a tribute of affectionate respect to this American people, with its inherited, instinctive love of law and order, its fidelity to honor and conscience and its sturdy defense of its rights and liberties.

May I not justly claim that this result in a truly representative straight American state is a conclusive demonstration, not only to Kentucky but to every other state and community controlled by our race, that its officers may always trust unhesitatingly to the ruling instinct, nay, even passion of our race, to uphold the law, even when, in a time of the greatest excitement and most deep-seated prejudice, disorder temporarily gets the upper hand. Woe to the officer or politician who temporizes or parleys with crime and violence under any circumstances; almost instantly the rebuke will come and the weakness will be punished.

The disorders in Kentucky, under the secret operation of the men who had a money interest in continuing their unlawful and criminal practices, lasted for nearly a year, but finally the reign of fear in thousands of homes has come to an end; and I trust in our people and believe that there can be no serious renewal of the troubles, although there is a possibility of detached local disturbances, inspired by the men who gained money and power through their leadership in the tobacco organization and the night-rider conspiracy against the people and their law. The murderers of Hiram Hedges are yet at large. The night riders are yet unpunished, but no statute of limitation protects them, and over all of them hangs the sword of justice of the people's law. Soon, I hope and believe, grand juries will indict and petit juries will convict, and the people will punish the criminals.

The measure of power or force in anything is always calculated by the resistance which it overcomes. A mere trivial power may whirl an electric fan several hundred revolutions a minute or a spindle three thousand times in a minute. That is because the resistance is slight. You may take a colony of Micmac Indians, one of the most harmless people on earth; they break no laws, but will you say of such a people that there is among them a power in the sentiment for law and order? There is simply a lack of inclination, a lack of independence, to do anything except in the usual way. This American people comes honestly by a sturdy independence and a strong temper and sometimes a hard-headed violence, but side by side with all that, goes a wonderful passion for law and order that can cure any disorder that may spring up in its midst.

I maintain that I have proved that in this typical American state — with a people almost all of whom were born on this soil of the old British-Scotch-English and Irish stock, with all its hard-headedness, its fearlessness, and its daring not deteriorated, but as strong to-day as it was in the

pioneer ancestors that came down into the dark and bloody ground—the best evidence of the strength of the law-and-order sentiment is when a people like that puts down just as strong people who, under temporary excitement and passion and prejudice, break the law. It is the resistance that measures the strength of the power, and, measured by that, all these instances I have told you of resistance to law and order are only so many conclusive evidences of the overwhelming power of the sentiment of the people to put down lawlessness and protect liberty, with their lives if need be.

Now I say to you that in every state ruled by our race the sentiment of law and order, just as it is in this typical state of Kentucky, is the strongest sentiment in the hearts of our people, and it will surely put down all lawlessness and disorder. This country will never degenerate into anarchy, but will put it down in whatever form it is manifested, and will bring the criminals to justice; we shall do it in Kentucky and lead the way for all the rest of the states.

II

THE LEGISLATURE

OUR STATE LEGISLATURES[1]

By Samuel P. Orth

Does a fiendish necromancer transform a John into a Judas when he enters the halls of legislation, or is it impossible to elect able and honorable men to make our laws? Popular impression seems to affirm both horns of this deplorable dilemma. We have grown to distrust our state legislatures. Their convening is not hailed with joy, and a universal sigh of relief follows their adjournment. The utterances of the press, the opinions of publicists and scholars, and the sentiments of the street and the market place are quite at one in their denunciation of the legislature. Our representatives are the subject of jest and ridicule, of anger and fear. This is a serious matter. When a democracy loses faith in its lawmakers, respect for law must soon fade away, and with it vanishes self-government.

Has it never occurred to us that these gibes and thrusts, cartoons and editorials, sermons and sentiments, ought to be directed against ourselves and not against our servants?

I am not writing an apology for legislative excesses. The man who thinks a legislature infallible harbors an insane delusion; the man who thinks it utterly depraved allows his malevolence to dispel his reason.

A careful study of and long familiarity with state legislatures, with their personnel, the conditions under which they were elected, and the environments in which they performed their tasks, leads me to believe that some of our criticism is misplaced, and some of our zeal and activity displayed at the wrong time. There are faults, gross and glaring, in the conduct of state legislatures. There are also faults, as gross and glaring and less excusable, in the conduct of the constituencies which selected the legislators. These must be studied together, that the truth may be learned and the faults remedied.

The nature of the problem and the scarcity of published data render the scientific study of the legislative situation delicate and difficult. I have here attempted a fragment of such an inquiry. For this purpose I have taken four legislatures, of states whence biographic data were

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forthcoming. It is of course vain to seek in a handful of biographic statistics the special fitness of a given class of men for legislative duty. Yet the average human being is influenced most potently by education, by occupation, and by experience. Knowing these, we can at least roughly gauge his fitness for the ordinary duties of public life. Genius, indeed, is not amenable to statistical diagnosis, neither is it an element in this analysis. There is not even a "trace." Genius would not be representative of the masses.

I begin with the legislature of Vermont, a sturdy New England state, clinging more nearly than any of its neighbors to the ideals of a day long past. A survival of the Revolutionary times gives each town a representative in the lower chamber. Hence we find one of the largest assemblies in one of the smallest states. There are two hundred and fifty-two members in this populous House of Representatives, while in the Senate there are thirty members.

Of the thirty members of this Senate, only three were college graduates; seven had received training in professional schools; seven had been educated in academies, so numerous in New England; and thirteen received no further education than that offered by the public schools. Nine of the senators were farmers, of lawyers and physicians there were four each, and thirteen were engaged in mercantile pursuits. The state constitution limits the age of the senators to thirty years. Only three members of this Senate were under forty years of age, one half were between fifty and sixty, six ranged in age between forty and fifty years, while six were beyond threescore, the oldest member being seventy-three. The average age of the lawyers was forty-three years, of the physicians fifty years, of the business men fifty-one years, and of the farmers fifty-four years.

Of these thirty men only three had had no previous political experience. Some had been in office practically all their lives. One had carried the burdens of "all the usual town offices." Another had been township clerk thirty-five years, chairman of the selectmen thirty-seven years, and all this while a member of the school board and an assistant judge. Another had held "most of the town offices," while still another had held "all except clerk and treasurer." What showers of public honors!

In the House one twentieth were college graduates, one fourth had received training in academies, while over one half had gone no farther than the public schools. There were one hundred and twenty-three farmers in this House, six lawyers, ten physicians, forty-eight merchants and manufacturers, three bankers, five preachers, six insurance writers, two hotel proprietors, three liverymen, fourteen laborers or artisans, including a blacksmith, a driver, a sailor, a teamster, a painter, a "board sawyer," several laundrymen, carpenters, and loggers. Six had no visible occupation other than that of "politician and officeholder," while one was a student not yet graduated from his college. One would think that a

wonderful degree of versatility and originality was displayed by some of these lawmakers in their private pursuits. One member made his daily bread by "occasional speculation," another was a "fish culturist." One useful member was a "lawyer, farmer, and breeder." Another was busy as "town clerk and treasurer, and clerk in a general store." But the most versatile of this coterie of men of many affairs was one who professed to find time to be a "furniture dealer and undertaker and miller and dealer in grain and feed."

In this House were twelve under thirty years of age; one sixth were between thirty and forty years, one third were between forty and fifty years; one fourth were between fifty and sixty years; while thirty-five were old men over sixty. The average age of the lawyers was forty years, of the business men forty-three years, of the laborers forty-three years, of the farmers fifty years, of the physicians fifty-two years, and of the clergymen fifty-five years.

This House also was rich in political experience. Only one eighth had never before held public office, and these were mostly the young men. Many of the older members had held office for fifteen, eighteen, twenty, and thirty-six years. Over one half had held more than three offices, and had been in public service more than ten years.

Of this body of two hundred and eighty-two lawmakers only nineteen had sat in former legislatures, — several, it is true, for four or five terms; but the vast bulk had received no previous training in legislative work. Such special preparation for legislative duties as they possessed they had received in the minor township and county offices. Thirteen of these men were old soldiers, and two were of foreign birth.

Ohio may be taken as a type of the populous state in which manufacturing, mining, and agriculture are of nearly equal importance. There sat in its general assembly thirty-three senators and one hundred and ten representatives.

In the Senate one third had received a college training, a second third had not been farther than the common schools, and the last third had been trained in academies, normal schools, and professional schools. Fourteen, or almost one half of this body, were lawyers; nine were engaged in business affairs. There were two teachers, two editors, two farmers, and one physician. Nine of the senators were under forty years old, nine were between forty and fifty years, ten were between fifty and sixty years, and two were over sixty years old. The average age of the lawyers was thirty-six years, of the editors thirty-eight years, of the business men forty-four years, of the teachers forty-nine years, and of the farmers fifty-five years.

One half of these senators had not held previous political office of any kind. Only six had had previous legislative experience.

One eighth of the House members had received a college education; three eighths attended normal schools, academies, or professional

schools; and nearly one half received only a common-school education, one representative reporting that he had not been "in school after twelve." One third of these representatives were lawyers, one fifth were farmers, one sixth were business men, including manufacturers, bankers, druggists, a lumber dealer, a cattle buyer, a hatter, and a confectioner; there were ten teachers, — all from country schools or villages, — five physicians, three editors, and one preacher. Ten laborers and artisans also participated in the lawmaking. This category includes a machinist, several carpenters, and a cigar maker. There were two auctioneers in this House, one the proud possessor of "an established reputation," and the other "one of the best in the country." Here was a commercial traveler who laid claim to greatness because he had "traveled more than one hundred and eighty thousand miles." One member had for thirty years been a court crier accustomed to the routine of court drudgery. With him sat a metal polisher who was an exponent of labor unionism. One member was still a student in a law school. And, most unusual of all, there sat in this heterogeneous assembly a "musical composer" with a "national reputation, being the author of many works on music and over one hundred piano compositions, many of which have proved very popular," which is more than can be said of some of the legal compositions which he helped enact.

Of these representatives of the people six were under thirty years of age, very nearly one half were between thirty and forty years, one fifth between forty and fifty, one eighth between fifty and sixty, and one eighth over sixty, the oldest member being eighty years old. The average age of the teachers was thirty-five years, of the lawyers thirty-five years, of the editors forty-two years, of the physicians forty-five years, of the laborers forty-one years, and of the farmers fifty-four years.

One third of the House had not held any previous political office. Nearly one fourth had been members of former legislatures, and four of these men were professional politicians; while others were "experienced politicians or active in politics," or had "entered politics." Such members had usually filled county and township offices. It is probable that scarcely any one is sent to the state legislature who has not been active in local party organizations, as a committeeman or as a delegate to county or district conventions. The acquaintance thus formed is an essential prelude to a successful political canvass.

There were members in this assembly who had tried their skill at many occupations. The teacher who had turned lawyer or editor or farmer was the most numerous of this class. Several were both farmer and merchant; others wrote insurance between the intervals of law practice or merchandising. It is the man of modest affairs, or the man of no affairs, who most relishes legislative experience. Over one tenth of these members were old soldiers, and five were foreign born.

Indiana represents the states of the Middle West where the agricultural interests are still predominant. Of the fifty senators who composed

its upper house, ten had received a college education, eight had graduated from professional schools, eight had partially completed a college course, twelve had attended normal schools or academies, while quite one third had not passed beyond the common schools. Lawyers composed just one half of this Senate, six followed mercantile pursuits, seven were farmers; of artisans there were five, including a glass cutter and a factory foreman; there were also four physicians, two teachers, and one editor. Only one of the senators was under thirty years old. One half were under forty, one third were between forty and fifty, eight were between fifty and sixty, while only three were over sixty. The average age of the lawyers, the predominating force of the body, was forty years, of the physicians thirty-nine years, of the teachers forty years, of the artisans forty-five years, of the farmers forty-seven years, and of the business men fifty years. This was virtually a Senate of young men. One third had not held previous political office, while one tenth had held office over ten years, and one third had been members of former legislatures, many of them for several terms.

One seventh of the House members were college graduates, sixteen had received training in professional schools, six partially completed their college course, while eighteen had attended academies or normal schools. Nearly one half the members had no other education than that offered by the public schools. The records of some of these men recall the pioneer days. Two had received but "six months' schooling." Another had been deprived of all educational advantages in his youth, and what education he possessed he received after he had grown to manhood. One member had learned to read in Sunday school. Yet another had only a "limited education." And still another survival of the age of primitive things had got "four months of schooling in a log schoolhouse." Not quite one third of these representatives of the people were lawyers; another full third were farmers; of the remaining one third, four were physicians and four were editors; the remainder was about equally divided between business men and artisans or laborers. With the bankers, manufacturers, and merchants sat carriage makers, miners, painters, glass blowers, bricklayers, bottle blowers, and plumbers. Here also we find a member who was still a student in college, and who was honored with the privilege of nominating a United States senator.

Of experience in officeholding a scant one third had had none, while five had been in public service over ten years, and one had held office over twenty-two years. Nearly one fourth had been members of former legislatures.

Nine of this House were under thirty years of age and nine were over sixty. The rest were about equally divided among the three decades between thirty and sixty years. The average age of the lawyers was thirty-four years, and twenty of this number were only thirty or under; of the laborers or artisans forty-two; of the business men forty-four; of the physicians fifty-five; and of the farmers fifty-five years.

In this assembly were eight old soldiers and four foreign born. There is evidence here of the same diversity of gifts that we have found in the other states. Here is one man who was "teacher, publisher, and lawyer"; another who combined the tasks of "farmer, brickmaker, and bricklayer." Of "farmer and lawyer" there are many; so of those who unite the duties of "teacher and merchant" or "teacher and farmer," or "merchant and insurance"; while one carries his partisanship into his breadwinning as a "farmer, carpenter, contractor, and Democrat."

Here also sat representatives of the labor union, one of whom avowed his convictions that "our tax and financial systems should be overhauled." Fortunately he was in a large minority, and there was no overturning of established institutions. A "sound-money-protectionist-expansionist" helped neutralize the acid of socialism.

Finally, Missouri may be taken as a representative of the southwestern states where the sentiments of ante-bellum days are being rapidly dispelled by manufacture and industry.

In the assembly I describe sat thirty-four senators and one hundred and forty-two representatives. One third of the senators were college graduates; nearly one half had not passed beyond the common schools; of the remainder about equal numbers had either a professional training, or had attended college for a short time, or had taken a course in a normal school or in an academy. Two thirds of the senators were lawyers; the remaining one third were mainly business men, only three farmers being found in the list, and one physician. One half of these men were between forty and fifty years of age, two were over sixty, and one third were under forty. The lawyers averaged forty-one years, the business men forty-seven years, and the farmers sixty-four years. Only five of this membership had held no former political office, and two thirds had been members of former legislatures, most of these for several terms. Nearly all of the lawyer members had been prosecuting attorneys, or city attorneys, or county judges. This Senate was therefore rich in political experience.

Of the one hundred and forty-two members of the lower house only seven had completed their college course, while twenty-seven had gone partially through college. Thirteen had attended professional schools and twenty-one had received their education in secondary schools. Over 54 per cent were limited to a common-school education. One member had formed the commendable habit of "studying at home," and his colleague in intellectual industry confessed himself "quite a student of political economy."

Not quite one third of the House were lawyers, and one third were farmers; one fourth were engaged in business pursuits, including banking, manufacturing, real estate, insurance, contracting, and milling. Six members were physicians, three were teachers, and nine were editors and "newspaper men." With the two clergymen sat one college professor

and one saloon keeper. The unions were represented by a plasterer, a "grainer and marbler," a miner, a smelter, and a "railroad-car inspector."

The variations of mercantile and professional combinations were as amusing as in the other states we have studied. Here was an "undertaker and lawyer," certainly a misjoinder of parties. Should it not read "undertaker and physician"? Here sat the "promoter and real estate merchant," the "salesman and mine organizer," the "furniture dealer and editor," the "horticulturalist," and the "breeder of hogs," the "merchant, miner, and farmer," and the "teacher, minister, and farmer." Of "farmer and merchant" there were several, also of "farmer and miner" and "farmer and teacher."

Seven of this interesting throng were under thirty years of age, one seventh were over sixty, over one third were between thirty and forty, and one half between forty and sixty. The average age of the lawyers was forty-one years, of the laborers thirty-nine, of the teachers thirty-five, of the physicians forty-two, of the business men forty-four, of the editors forty-two, and of the farmers fifty-one.

One fourth of the House had not held previous political office, while one third had been members of former legislatures, many of them for several terms. Over one half of the members had held more than two offices, and one third had been in office more than ten years. In this assembly of one hundred and seventy-five citizens seven were of foreign birth and forty-two had borne arms in the Civil War, either for the Union or for the Confederacy.

These are the four legislatures, and from what I can learn they are typical of the entire forty-five that convene annually or biennially in our land.

To those who look for a body of well-trained and expert lawmakers this analysis must be depressing. To those who affirm that the average state legislature is not representative of the great body of citizens, the data gathered are likewise disappointing, for one must be profoundly impressed by the real representative character of these lawmaking bodies. Every degree of education is represented. Indeed, the one fifth of the men of college training and the one third of academy or professional training far outnumber the ratio of such men in everyday life. Every profession is represented, — almost every conceivable business activity has its patrons on the floor of our legislature; with the farmer sits the artisan, with the banker sits the union-labor agitator, with the manufacturer sits the small shopkeeper, with the preacher sits the saloon keeper, with the professional specialist sits the Jack-of-all-trades. It is true that these assemblies are far more representative of the rural communities than of the great cities. I have mentioned the men who engage in a multiplicity of pursuits. These can thrive only in the country. The city exacts specialization. From the cities come most of the young lawyers seeking publicity, the labor-union representatives, and the professional politicians.

The age of the lawmaker is not that of unfledged youth or useless age. Man is in his prime from forty to sixty, and the very large majority of our legislators are of that age. The extreme youth, not yet in possession of his college degree, and the man laden with the experiences of eighty years are only picturesque extremes in these democratic assemblies.

And in the experiences of political life, likewise, every phase and variation is represented. Those who have been only voters, those who make politics a business; those who are ardent partisans, and those who are politically torpid; the conservative and the demagogue, — all are intermingled in these representative bodies. Even the foreign-born citizens are well represented.

But a legislature is not only to represent the people, it is to make laws; and, unfortunately for our legislative system, the making of laws requires expert knowledge, judicious temperament, and great wisdom. None of these qualities are apparent in bulk in any state legislature. The class of men who possess expert knowledge in framing and interpreting law are the lawyers. While they predominate over other professions in the legislature, those who are found there are either young men or men without large practice. I think that it will surprise my readers to learn that from one fourth to one third of the members had previous experience in legislative work. These can temper the conduct of the raw members, but they can scarcely be called experts. It requires also another species of expert to aid in lawmaking: the man who is possessed of technical information concerning the conditions that bring forth the law, — the mining engineer, the electrician, the shipmaster, the sociologist; the men who are most affected by the contemplated laws. These are rarely found in the halls of legislation.

There are other features of this problem which cannot be revealed by statistics, but which must be discovered by personal knowledge. How many of these men have been elected by corporate interests, to help pass laws favorable to corporations? How many are owned by politicians, and how many by rich individuals seeking ulterior gain? How many sought their seats with the secret purpose of bartering their influence for money? And finally, how many are absolutely independent, placing public welfare high above the claims of party or of persons? My experience must lead me to answer each of these questions in the same manner: But very few.

The legislature is composed of average men, possessed of human weaknesses, prejudices, and passions. They are elected by party machinery. They are pressed by corporate and party demands. The majority are as honest as they are simple, and as efficient as they are wise. These men meet to frame our laws; their work is largely foreordained. Let us scan hastily their method of organizing and the quality of their output.

I remember the first state legislature I ever saw. I was a freshman in college and had gone to the Capitol to witness the organizing of the Senate

and House. The scenes I looked upon were almost a parallel to those in which I had been an actor but a few months before, — the organizing of our freshman class. The importance suddenly thrust upon the fresh matriculate turns his head about as much as the sudden fame upsets the new legislator. Here are men who have always lived in small towns and out-of-the-way places, unaccustomed to travel and distinction, now become suddenly the center of interest for the entire state. Their pictures are in the papers, distinguished politicians seek them out, they are complimented and dined, and in the blaze of this transitory flame of glory they lose themselves. The state legislature has been the burial place of many a man's virtue.

The most important function of our early legislatures was deliberation. This has almost entirely disappeared. The rush of the age has invaded the dignified assembly hall, and bills are shot through as by pneumatic pressure. The two most important factors in modern legislation are the lobby and the committee. What deliberation now is granted a measure is given in committee rooms and in private discussion. In the turmoil and boyish ardor of organizing, the lobby interests must secure committees.

It takes some weeks before the new members become accustomed to legislative routine. An average session lasts about four months. Of these the first is given over to organizing and learning the pace, the second and third to trading and manipulating, and the final month is devoted to law passing.

The amount of this legislation is overwhelming. One of the legislatures I have described sat one hundred and thirty-two days. It passed four hundred and forty-eight general laws, three hundred and twenty-eight local laws, and sixty-two joint resolutions, a total of eight hundred and thirty-eight enactments, or an average of six and one third a day. But the work was not thus evenly distributed. One half of these measures were passed the last fifteen days. On the last day were passed seventy general laws, seventeen local laws, and six joint resolutions. On next to the last day were passed fifty-nine general laws, twenty local laws, and one joint resolution, — a total of one hundred and seventy-three enactments, or one fifth of the work of the session, in two days. I will grant that some of this grist had been ground out in committee, but how fine could even a committee grind so much grist? There are twenty-four hours in one day; in forty-eight hours one hundred and seventy-three laws were passed, or one law every sixteen minutes. But as the legislature sat only twelve hours a day, these rules of human conduct were created at the rate of one every eight minutes. What fecundity! And there is a fiction that every one is presumed to know the law.

These were not all trivial measures, mere amendments or matters of little import. The work of this session included important laws concerning the powers of the boards of health, laws regulating electric and gas corporations, and an entire negotiable-instrument code.

In the same year were passed by the various state legislatures nine thousand three hundred and twenty-five local laws and four thousand eight hundred and thirty-four general laws, — a total of fourteen thousand one hundred and fifty-nine ; an overproduction that has lifted lawlessness above par.

Of this mass of legislation a portion is wholesome, another portion is merely passive and harmless, — if, indeed, any innocent and inert law can be harmless, — a third fraction is vicious, and a final part is foolish.

The wholesome laws are usually the result of prelegislative deliberation. I believe the practice developed in recent years, of codifying all laws upon one subject, is a hopeful tendency toward mature legislation. The listless laws are the offspring of our deplorable habit of special legislation, mated with our American good humor. The foolish laws are the fruit of ill-conceived reforms. And the vicious laws are the result of bribery, of carelessness, of selfishness, and of partisanship.

The first group of vicious laws are due to selfishness and bribery.

Some men are always found in every legislature who were sent there for one special purpose. A few are always found who will play with the gold of others. The combination of these few with the gullible many makes possible vicious laws. Closely related to these men are the one or two "milkers" found in every legislature. These, under the guise of benevolence, introduce a bill "to further secure the rights of stockholders in insurance companies," or some kindred title, hiding beneath the most innocent phrases the most violent measures. This brings all the interested corporations to the capital with the pap, and the venal legislator fattens to bursting. Unfortunately legislation is often a marketable commodity.

Another class of vicious legislation is due to carelessness. The volumes of repealed and amended laws are tokens of this thoughtlessness. In 1873 the legislature of New York passed a charter for the metropolis, and the repealing clause threatened a general jail delivery. The governor refused to sign the measure until an amendment rectified this careless error. In 1882 the legislature of the same state passed a municipal code, and a whole page of the original was omitted from the copy sent to the executive for approval. Through a legislative blunder the supreme court of Ohio was robbed of a large portion of its jurisdiction two years ago, and an act of a special session of the legislature was required to override the mistake. A repealed or amended law is sometimes an indication of a change in conditions; more often it is a confession of weakness or of shortsightedness. Our tendency constantly to amend makes laws shifting as the sands.

And a final group of vicious laws are due to partisanship. The machine in American politics is the merging of all functions of government in one control. While I believe that the popular estimates of party tyranny are somewhat overdrawn, there are yet perennial occasions for a general revulsion of feeling. The party lash is too often substituted for public

conscience. When a United States senator is to be elected, party servility reaches its extreme. The candidates for the Senate are announced before the legislators are nominated, and the senatorial contest is no more confined to the state capitol than the presidential elections to the room wherein the electors meet.

The blood-bought Goebel Law of Kentucky, allowing the governor to appoint all local-election officials, and permitting the legislature to canvass election returns and reject the vote of any county, with no power of review in any court, is an example of the vicious extreme to which partisanship leads. In 1901 West Virginia passed ten "ripper" bills, giving the incoming governor the power to appoint all the boards of control of all the public institutions in the state. So are often created new and unnecessary offices and places, to serve as nests for the faithful party workers. The payrolls of our states, like those of our cities, are padded for the benefit of the party henchmen. The evil is multiplied when the machine allies itself to corrupt and powerful corporate interests. This is not infrequent. Every state has fought such unholy alliances.

The method used by party leaders to bring "pressure" to bear on a member, or to "lead him to see the light," are as amusing as they are diverse and original. I know of an instance where the wife of a reluctant legislator was kidnaped and held a prisoner for four hours in the rooms of a man who aspired to become, and did become, a United States senator. The political influence over the wife proved as potent as her influence over the husband. This winter, in one of our legislatures, it became necessary to put through a measure which was labeled "purely political, and therefore not a question of conscience," — an unusual inference. A boy member of the legislature happened to have a conscience which was somewhat political in its sensitiveness, and refused to line up. His father was called to the capital, and parental persuasion succeeded where political power failed.

And finally, in this long list of laws there are always a few fool measures. There is at least one fool in every legislature. He imagines himself a reformer. He slips in his bill and trades and logrolls for its passage. Thus in Nebraska the reformer wanted to prohibit women from wearing corsets and bloomers. This was clearly class legislation, for the title made no mention of men. In Pennsylvania he wanted to prohibit treating. In Kansas he wished to repeal the constitution and enact the Decalogue in its stead. In Indiana he desired benevolently to change the mathematical ratio of 3.1416 to 3.15 because it was "easier to calculate." And in Michigan he wished to forbid the wearing of tights in circuses and theaters, and the use of every language except English on the menus of hotels and restaurants. This last bill had its origin in the woeful experience of a country member who visited Detroit for the first time. He confessed that he could not read the menu at the hotel whither he had resorted for his dinner. So he blindly ordered twelve dishes, "and I 'll

be hanged if seven of 'em wer'n't potatoes," he divulged, as he explained his reform bill. In Arkansas three years ago the fool member actually succeeded in passing a drastic antitrust law which prohibits any corporation which is a member of any pool or trust *in any part of the world* from doing business in the state. The members who passed this all-reaching measure probably formed a *posse comitatus* to insure its efficiency.

These proceedings betray the common weaknesses of mankind lurking in the hearts of our legislators. The creation of a party, the legislator is by nature partisan; the creature of a boss, he is by nature servile; a lover of fame or of wealth, he naturally quails before temptation; a man from the normal walks of life, with neither special training nor special unfitness, he is amenable to the normal influences that commonly affect human action. There is no need of calling him names. He is the result of our system of politics. The college professor may call him "a country squire" or "a labor demagogue." The publicist may rail at "a body of boys, and inexperienced, unknown farmers." The preacher may hurl theological epithets at "the puppet tool of the damned boss"; the fact remains that the average legislature represents the average American human being. His pathology is not unique. We must not be so hasty in laying all the blame for vicious and careless legislation at the door of our representatives. A vast deal of the fault lies elsewhere.

In the first place we are law mad. We look upon law as a cure-all. If you want an index to all human ills, read the table of contents of any statute book. The legislature is not to be primarily blamed for this. It is in the air; the people demand this multiplicity of laws. And it certainly is an adventitious budding of our political tree, which the forefathers, in the planting, did not contemplate. The theory of the constitutional fathers was that the government should be one of limited powers. They believed that the people should be let alone, to work out their own salvation. They did not believe that the legislature could create values, morals, and happiness. We say of the commonwealth, "Let the legislature work out your salvation, and while it is doing so, fear and tremble." This seems to be an American mania, this craze for law collecting, like our craze for bric-a-brac. In no liberal country in Europe are there so many laws as in our country; in none are laws more burdensome and less conscientiously enforced. No European health commission has such arbitrary powers as an American board of health. While we are filling quarto pages with legislative rubbish, let us recall Tacitus: "When a state is most corrupt, then the laws are most multiplied."

In the second place we have developed the deplorable habit of special or private legislation, and this habit we are carrying to a silly extreme. Over one half of the laws annually passed are local or special in their nature. Utterly insignificant as are these backyard measures, they are enacted at the demand of a clamoring constituency, and rob the legislature of its time and strength. A member's reputation is multiplied by

the number of such laws that he can pass for his neighbors. I know of one who fathered twenty of them successfully, from babyhood to maturity, in one year. His constituency rewarded him for this commendable energy by electing him to higher office.

Everybody with a grievance or an ambition hastens to the legislature. The member feels called upon to look first after the interests of his constituents, afterwards to the interests of the state at large. He uses these private bills as a lever upon which to raise his prestige as a statesman; as a medium of exchange for legislative values, trading with his fellow lawmakers for the passage of their private bills. These measures receive practically no attention from committees. If the people of the district want them, why that settles it. They know their business. So the whim of a farmer or the wish of a neighborhood becomes glorified into a statute.

This custom is made possible by another American custom, that of district representation. Why should a man live in a given corner in order to be able to make laws for a state? Of course the reason is that that particular district feels entitled to special legislation. The two customs are twins, one should perish with the other.

In the third place we have not yet learned to differentiate entirely the functions of legislation and administration. When the evolution which dictates the total separation of these functions is completed, then separate organs of administration will be developed, as they are in France and Germany. But meanwhile our state legislatures persist in confusing the administration of state institutions with the making of law. This practice is baneful alike to institutions and departments of government, and to the purely legislative work of the assembly.

In the fourth place we seem entirely oblivious to the forward strides of our republic, and to the fundamental principle that government must march *pari passu* with progress. We seem to forget that, since the days of the first thirteen states, our population and social and economic conditions have undergone wonderful changes. Then society was agricultural and wealth individual; now society is urban and wealth corporate. The change in needs and the multiplicity and diversity of emergencies which arise in this complex society we meet with legislative methods which were suited to the simple needs of a sparsely settled agricultural community.

The most potent force in our economic life is the corporation. This creature of law has become the creator of law. This shifting of property obligation from the individual to the aggregation necessitates a new conception of duty. But have you ever seen evidences of a corporate conscience? All branches of our public law have been undergoing a slow metamorphosis, because of the entrance of the corporation into our legal environment. So must all branches of our private law become modified. The corporation has found a permanent place in our business life, but we have not yet formed for ourselves a permanent safeguard against its constant intrusions upon private rights. We have retained the simple methods

of a colonial legislature, while society has proceeded with giant strides toward the goal of corporate property and responsibility. It is not an impossible task for a corporation to own a legislature. More than one railroad corporation has successfully accomplished this task of government ownership. These great artificial beings have many times set out to elect a legislature in consonance with their desires. They have also many times secured the control of a legislature after its election. We cannot excuse corruption, neither ought we to excuse a society that meets such novel and potent conditions with such primitive and impotent methods.

There remain the two usual accusations, heard wherever a legislature is discussed: these men lack ability and experience, and they also lack the time necessary for deliberate and judicious action.

It is true that the average representative is not a man of unusual ability. Men of ability cannot usually be persuaded to leave their congenial occupations and subject themselves to the harsh criticisms of an unfeeling public, and to the rigors of a political contest. I value among my acquaintances a man of culture and ability who was requested by his neighbors to allow his name to be used as a candidate for the legislature. He was obliged to refuse, for the pay the state allowed was not enough to meet his expenses as a candidate and legislator. He would have to suspend his work and hire some one to take his place during the session. It is only in a crisis that a citizen should be compelled to give his fortune and his livelihood to the state. We do not pay our legislators a living wage, certainly not a wage that can attract ability. We do not honor our lawmakers, but rather it is a term of ridicule and jest among the cultured classes to be known as a member of the legislature.

The result of this attitude of the state is perfectly natural. The men of ability avoid the office. About 75 per cent of the members seek the place. They are of a kind who relish the opportunities that accompany it. Some are available because they are "old soldiers" from the Civil War, others because they are young soldiers from the Spanish War. Some have been party servants, and this is their reward for faithful service. Some "voted for Lincoln." A few are the incarnation of radical ideas. And still fewer have only the recommendation of a quiet, useful life filled with good deeds and honest, plain thinking. Of the four legislatures tabulated above, I can count a scant dozen men in each body who are really men of superior ability or experience. The rest are not necessarily mediocre, but fairly represent the average intelligence, honesty, and ability of the community. There are a few young men who seek the position as a stepping-stone to higher political honors. A few of these subsequently rendered the nation valuable service; some of our wisest statesmen received their training in these preparatory schools of legislation. A large number graduate into Congress. In the national House of Representatives $37\frac{1}{2}$ per cent of the members were thus prepared, and of the Senate $44\frac{3}{10}$ per cent.

In 1777 it was written into the constitution of Vermont: "The House of Freemen of this state shall consist of persons most noted for wisdom and virtue, to be chosen by ballot, by the freemen of every town in this state."

Time and conditions have lowered our standard. We are content with average wisdom and average virtue; and in years of apathy virtue and wisdom are quite forgotten, and we elect whom the machine nominates. Rotation in office, party control of nominating machinery, the ambitions of corporations and of party leaders, — these are the forces that move the pawns on the legislative chessboard. Under the political conditions which the majority of the voters tolerate, can we expect the legislature of a state to be composed of the best men of the community? And we know that the real danger of the democracy is the withdrawal of intelligent and humble men from public duties.

That the legislature lacks time is axiomatic. The community and conditions rob the legislator of his hours. It is not the willful sin of the representative that he gives heed to the thousand voices that constantly call to him from his constituents. From every hamlet in the state, from every township and city, from every corporation office, flows a stream of bills to the honorable representatives of the various districts, and on the mad current of this stream are rushed forward bills, members, and public. The veto of the governor and the efforts of the few able members cannot dam this annual overflow of our legislative Nile. Unfortunately the silt that the recession of opinion leaves after the adjournment of the legislature reeks with the unwholesome odor of bad laws, of foolish laws, and of vicious laws. This deluge pours forth from the people; it is not the creation of the members.

These are the conditions from which modern legislatures and their work arise.

Instead of setting ourselves to the task of bettering the conditions and making scientific legislation possible, we have turned elsewhere for relief. First, we have tried to minimize legislation by biennial sessions, and some have even suggested quadrennial sessions, and standing commissions for enacting orders which should stand until the meeting of a decennial legislature. This tendency is not in consonance with the spirit of a republic. The evil we combat is not legislation, but unwise legislation. Legislation is a vital function of the body politic. And legislation by representation is the life blood of a republic. We dare not allow the legislative organ to atrophy; we must help it to greater specialization, and thus follow the laws of evolution. The first step in this development was the committee system. That is now outgrown. The next step must be toward a still greater degree of specialization. The function of the lobby must be absorbed by legitimate legislative organs.

Second, we have become accustomed to view the courts and not the law as the bulwark of our freedom. The courts stand between the people

and the people's legislature. They ward off the evil effect of pernicious laws. It is anomalous that a free people should need a court of justice to save it from the destructive forces of its chosen lawmakers. We are drifting from the Saxon toward the Roman ideal, when the court becomes both the lawmaker and the judge.

Our theory of legislation by representation is not wrong, but our practice of the theory is antiquated. Yet even with our present crowded calendars, and lobbies, and party bosses, and corporate omnipotence, noble results can be attained if the people are not supine. After all, it all lies with the people. They can dignify the office of lawmaker by choosing only the honest and the able; they can degrade it, they have degraded it, by choosing the average, the mediocre, the vicious, and the foolish. All of our political evils feed upon the indifference of the people. Popular demand is the ultimate source of good law; popular indifference is the immediate source of bad law.

FINANCIAL PROCEDURE IN LEGISLATURES[1]

By Ernest L. Bogart

[The methods of financial legislation in the state legislatures are full of confusion and are indeed in urgent need of systematization. There is a growing tendency to make permanent appropriations for certain administrative and educational tendencies of the state. In some states the disadvantages and dangers of the lack of concentration have been recognized and steps have been taken to bring all financial legislation under the supervision of one committee.]

In New York the Committee on Ways and Means prepares two bills, — the annual appropriation bill and the supply bill. Of these the former includes the permanent appropriations, such as the salaries of the state officials, fixed appropriations to state institutions, etc.; the supply bill includes indeterminate and changing items of expenditure, such as appropriations for improvements on the canals, new state buildings, etc. The grants made by the appropriation bill are not good until the following October, while those made by the supply bill may be drawn upon immediately after its passage. As noted before, the general appropriation bill is passed toward the beginning or middle of the session, or at least comes up for discussion by that time; the supply bill is usually printed at the end of the session, just in time to meet the constitutional requirements, and is then rushed through without due examination or debate. It is therefore never possible to determine exactly what the appropriations of the legislature have amounted to until the very end of the session; or, indeed, even then, for many bills making appropriations of the public

[1] From an article in the *Annals of the American Academy*, September, 1896. Reprinted by permission.

money are every year left in the hands of the governor after the adjournment of the legislature, to receive his signature. Not until these bills are finally disposed of, therefore, can the amount of the year's appropriations be exactly determined. For all practical purposes, however, the calculation made at the end of the session suffices.

There are some portions of the public expenditure which are not dependent on the annual grants of the legislature, being provided for by statutes that run without limit of date.

In the ordinary financial transactions of government it is the custom to prepare a budget giving all the receipts and then appropriating these receipts by grant among fixed objects of expenditure. Not so in the United States. In most of our commonwealths there is no general table of receipts to be appropriated by legislative grant for definite purposes. On the contrary, the receipts are divided among a number of separate accounts called funds, and the expenses again are defrayed out of these various fund receipts, each of these accounts being kept separate from the others.[1]

The number of funds is entirely arbitrary, ranging from two to forty-six. Sometimes new funds are added by every legislature when it is desired to take certain classes of receipts out of the general revenue and to place them in fixed categories beyond the reach of legislative whim. In Georgia and Maine we find a number of so-called funds which apply only to expenses and simply denote so many purposes of appropriation.

The proportion of those parts of the public expenditures and receipts which do not require to be legislated upon annually, but which are provided for by statutes which run without limit of date, differs greatly in different states.

There is no apparent rule in the matter which differentiates the commonwealths according to either age or geographical position, unless it be that the older commonwealths provide for their expenditure, and the newer commonwealths for their receipts, by means of permanent statutes rather than by current legislation. In Kansas, Mississippi, Nebraska, Nevada, Tennessee, Texas, and Washington all of the commonwealth expenditures are made in virtue of current legislation; in Indiana, Kentucky, Pennsylvania, South Dakota, and Utah almost all are so made; in Michigan and Montana three fourths; in Minnesota and North Dakota about three fifths; in California, Colorado, and West Virginia one half. On the other hand, South Carolina and Vermont provide for nearly all of their expenditures by permanent statutes; Iowa and New Hampshire so provide for three fourths of theirs. When we turn to the revenues of the commonwealths and inquire how that is determined, we find a larger proportion of commonwealths establishing revenue by means of statutes which run without limit than was the case with the public expenditures. North Dakota, Oklahoma, Pennsylvania, and West Virginia obtain all their commonwealth receipts in virtue of permanent statutes; Kentucky, South

[1] E. R. A. Seligman, Finance Statistics of the American Commonwealths, p. 5.

Dakota, and Washington raise almost all of theirs thus; Vermont and Massachusetts fourth fifths and two thirds of theirs respectively; Colorado and South Carolina each one half. On the other hand, California, Indiana, Kansas, Mississippi, Nebraska, and Tennessee raise all revenue by means of current legislation; Michigan all but educational funds; Nevada and Utah almost all thus; Montana and New Hampshire three fourths and two thirds respectively of theirs.

"The General Fund is found in all the commonwealths, and corresponds to the budget of most governments. It consists of all the ordinary receipts not especially appropriated to other funds, and thus serves as a sort of dragnet of commonwealth finance."[1] It will thus be seen that it is only over the General Fund that the legislature can exercise unrestrained control, and in proportion as the amount of revenue which flows into this is diminished by permanent grants to other funds, just to that extent is the financial independence of the legislature decreased. This is especially true of those commonwealths where the rate of taxation is limited by statute or constitutional provision, since in these the amount of state revenue is fixed, and can grow only with the increase in value of the taxable property of the state, or by finding new sources of revenue.

The main source of revenue for commonwealth purposes is the general property tax. Usually a certain percentage of the general taxes or a special commonwealth tax is devoted to the support of the free public schools; in a number of commonwealths a poll tax of small amount is levied for this or a similar purpose.[2] In the same manner the proceeds of other taxes or sources of revenue are devoted to certain specific ends, and are removed entirely from the power of the legislature to change them. Thus, though the legislature may nominally dispose of large sums and make large grants to various objects, their real authority is very much circumscribed. This is especially true where any large part of the revenue is derived from trust or investment funds, and particularly so if the proceeds of these funds are devoted by statute to some specific object. Appropriations made under such statutes are placed on the annual appropriation bills and are submitted to the finance committees who have, however, no power to materially alter them. They can, at most, run up or down the scale of a certain number of appropriations which must in any case be kept up. No money can be drawn from the public treasury except upon appropriation made by the legislature, so all grants must be acted on at least biennially.

When the appropriation and supply bills are introduced to the assembly, which is usually done on a date before determined upon, the assembly immediately resolves itself into committee of the whole. The bills are then considered item by item, and section by section, criticisms and suggestions being very freely offered by members of the committee. The bills are defended by the chairman of the Committee on Ways and Means, and

[1] Seligman, Finance Statistics, p. 7.

[2] See Seligman for list of funds, etc.

explanations of new appropriations or changes in the old are made by him. It is always the endeavor of the Ways and Means Committee to have their bills passed with as little alteration as possible, and to this end they devote all their energies. It shows not only that they enjoy the confidence of the legislature, but also that they are in touch with their constituents and familiar with their needs, and upon this they particularly pride themselves.

This is the nearest approach to the responsible English ministry, upon the acceptance of whose budgets depends their stay in office, which we possess. It is, however, less a matter of responsibility with our Committee on Ways and Means than a desire to make political capital out of it; to be able to point to the record made as chairman of that committee when putting forward a claim to the nomination for governor next term.

The assembly is invariably delayed with amendments or with bills containing new appropriations by individual members. Members with pet little appropriation bills of their own endeavor to have them accepted by the Committee on Ways and Means, and to have them inserted in the supply bill, as they then stand a better chance of being passed than if they were exposed, alone and unsupported, to the fire of criticism of the House. Many of the states have inserted provisions in their constitutions forbidding the inclusion in the general appropriation bill of any appropriations except those "for the ordinary expenses of the executive, legislative, and judicial departments of the state, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing one subject." This provision prevents also the addition of "riders" to the general appropriation bills. It is found in the constitutions of Alabama, Arkansas, California, Colorado, Georgia, Illinois, Missouri, Montana, North Dakota, Pennsylvania, South Dakota, West Virginia, and Wyoming. A new section was inserted in the revised constitution of New York, which aims to prevent this abuse in that state. It is as follows: "No provision or enactment shall be embraced in the annual appropriation or supply bill, unless it relates specifically to some particular appropriation in the bill; and any such provision or enactment shall be limited in its operation to such appropriation."

Although in accordance with a long-established precedent, bills appropriating money usually originate in the lower branch of the legislature, the Senate has always reserved to itself the fullest possible privileges in the matter of amendments to these as well as all other bills. The Senate invariably makes amendments, if for no other reason than to show its right to do so, and to justify the popular belief that the Senate is a more competent body than the assembly. There is not that great difference of opinion in the two branches, however, as to the proper size of the appropriations in our state legislatures which distinguishes the passage of the federal appropriation bill by Congress. In the state legislature it is difficult to say which is the more liberal or economical, though in the

long run the Senate is probably the more conservative. As has been noted before, only four states have constitutional provisions as to the place of origination of appropriation bills. When such bills reach the Senate after having been sent from the assembly, they are referred first to the Finance Committee, and then reported by it to the Senate. Their treatment in the Senate is similar to that in the lower branch, and after passing the Senate they are returned with their new figures and amendments to the assembly.

In case the bills as returned are not accepted by the assembly, a conference committee is appointed of members from each House to adjust the differences. They seldom fail to agree, and more often than not adopt the assembly's figures in the bill they finally report. It happens very infrequently that supplies are refused because of a failure to agree. The same mode of procedure is followed in all the states in this respect.

There is not the same chronic complaint of underappropriations heard in our state legislatures as in the case of Congress, where a deficiency bill is to be considered as regularly as the annual session opens. In fact, there is greater danger of too large than of too small appropriations. Toward the end of the session, however, a supplemental supply bill is often introduced to make provision for deficiencies under the other grants or provide for new items of appropriation.

Such is, in brief, the method of dealing with general appropriation bills in the New York state legislature. Far different is the treatment of individual appropriation bills introduced by members. As soon as the committees are organized any member can introduce bills, and the right is practically without limit until toward the close of a session; and then only because of the physical impossibility on the part of the committees of considering new bills and the practical certainty that they will be "smothered" if they are referred. Private appropriation bills are not necessarily referred to the Committee on Ways and Means, as might be expected, but to the committee on canals, cities, or what not, for which the appropriation is designed. In other words, if a bill making an appropriation for deepening the Erie Canal in a certain locality were introduced by a member, it would be referred to the Committee on Canals and reported by them to the House. As such a committee is made up of men who live along the borders of the canal and who are pledged to their constituents to spend money on it, there is little chance of the bill being unfavorably reported. It is chiefly in connection with these bills that "logrolling," as this exchange of political favors is called ("you roll my log and I 'll roll yours"), occurs, and of course the rooms of these committees are the chief scene of this sport. Mississippi is the only state whose constitution recognizes the existence of this evil and attempts to prohibit it by legislative

[1] In a recent legislature one of the members, on being asked how he was going to vote on a certain rather questionable measure making a large grant of public money for purely local purposes, replied that "he had never voted against an appropriation bill during his entire term and he would not vote against this." And he did not stand alone in this position,

enactment. "Logrolling" is there defined as a felony, punishable by imprisonment of from one to ten years.

Hearings, usually anything but formal, are given to interested parties on proposed bills, and it is often possible to influence the chairman of a committee to report favorably. They are seldom averse to so reporting appropriation bills. When a day is appointed by a committee for hearings on a proposed bill, notice is given to the advocates of the bill; and if, by any happy accident,[1] adversaries to the bill know that a measure is pending which they wish to oppose, they also have a chance to be heard. There is no attempt made to take proof, and the treatment of bills at these hearings is anything but judicial. If the bill involves large interests, the more effective work is done by trained lobbyists. After a bill has reached the legislature, too, its course may be and usually is favored by lobbying. So great had this latter evil become in some of our states that in three of them — California, Georgia, and Oregon — lobbying was declared a felony. In New York it is forbidden on the floor of the House!

The length of time for which appropriations are granted and during which they are available varies in different states. In New York, and in eight other states, the constitution provides that all payments under any specific appropriation must be made within two years of the passage of such appropriation act. All balances then unexpended revert, usually, to the General Fund, unless reappropriated. In sixteen other commonwealths the period is limited by legislative enactment to two years, or a similar period terminating after the opening of the next session of the legislature. In six of the commonwealths appropriations are good until they are exhausted or until the act making them is repealed. I could find no mention of the subject in either the constitutions or statute law of the remaining commonwealths, so that we may infer that no time limit is set to the period of their availability.

METHODS AND CONDITIONS OF LEGISLATION[2]

By James Bryce

I. The demand for legislation has increased and is increasing both here and in all highly civilized countries.

II. The task of legislation becomes more and more difficult, owing to the complexity of modern civilization, the vast scale of modern industry and commerce, the growth of new modes of production and distribution

[1] A gentleman, whose business requires him to keep himself posted on the various measures before the legislature, informs me that he has for years paid a large annual sum to a certain man in Albany, whose sole business it is to keep track of all bills introduced in the legislature and notify his client when any which he considers injurious to the latter's interests are brought before the committees. This man has a large clientage, by whom he is paid for work which should be performed by the legislature. He keeps a large staff of clerks busy and draws a large income from this business.

[2] From an address to the New York Bar Association, 1908.

that need to be regulated, yet so regulated as not to interfere with the free play of individual enterprise.

III. Many of the problems which legislation now presents are too hard for the ordinary members and even for the abler members of legislative bodies, because they cannot be mastered without special knowledge. (It may be added that in the United States a further difficulty arises from the fact that legal skill is often required to avoid transgressing some provision of the federal or a state constitution.)

IV. The above conditions make it desirable to have some organized system for the gathering and examination of materials for legislation, and especially for collecting the laws passed in other countries on subjects of current importance.

V. To secure the pushing forward of measures needed in the public interest, there should be in every legislature arrangements by which some definite person or body of persons becomes responsible for the conduct of legislation.

VI. Every modern legislature has more work thrown on it than it can find time to handle properly. In order, therefore, to secure sufficient time for the consideration of measures of general and permanent applicability, such matters as those relating to the details of administration or in the nature of executive orders should be left to be dealt with by the administrative department of government, under delegated powers, possibly with a right to disapprove reserved to the legislature.

VII. Similarly, the more detailed rules of legal procedure ought to be left to the judicial department or some body commissioned by it, instead of being regulated by statute.

VIII. Bills of a local or personal nature ought to be separated from bills of general applicability and dealt with in a different and quasi-judicial way.

IX. Arrangements ought to be made, as, for instance, by the creation of a drafting department connected with a legislature or its chief committees, for the putting into proper legal form of all bills introduced.

X. Similarly, a method should be provided for rectifying in bills before they become law such errors in drafting as may have crept into them during their passage.

XI. When any bill of an experimental kind has been passed, its workings should be carefully watched and periodically reported on as respects both the extent to which it is actually enforced (or found enforcible) and the practical results of the enforcement. A department charged with the enforcement of any act would naturally be the proper authority to report.

XII. In order to enable both the legislature and the people to learn what the statute law in force actually is, and thereby to facilitate good legislation, the statute law ought to be periodically revised, and, as far as possible, so consolidated as to be brought into a compact, consistent, and intelligible shape.

LEGISLATIVE REFERENCE DEPARTMENT[1]

By Charles McCarthy

Legislative Reference Work

The Legislative Reference Department of the Wisconsin Library Commission was established in a small way in 1901. It became apparent at once that the demands of this library were of a peculiar nature, which could not be readily met by the ordinary library methods or by the ordinary library material.

A plan was devised which has been since carried out as far as the resources given by the legislature would permit. We found that there was no coöperation between the different states of this Union in the matter of getting the history of legislation. We found that there was a constant demand for a history of what had occurred in Europe or in any state of the Union, upon a certain subject of interest to the people of this state. We tried to supply this demand by getting such indexes of up-to-date legislation as were published, by getting the bills from other states as well as the documents explanatory of legislative movements in other states, and arranging these under the subjects so they would be immediately at the service of all who desired to see them. We soon found that even this material did not solve the problem. We found it necessary to clip newspapers from all over the country and to put the clippings in book form, to index them carefully, and put them also with the subjects. We went over our own bills and carefully indexed them back for four sessions, and by noting the subjects which were contained in those bills we anticipated the problems with which the legislature had to grapple. These problems or special subjects we carefully worked up through the most minute detail. It was comparatively easy to get laws and court cases, but it was a far harder job to find how those laws were administered, and to find the weaknesses in them and to note as far as possible how they could be adapted to our use here.

Our short experience has taught us many things. We have been convinced that there is a great opportunity to better legislation through work of this kind,— that the best way to better legislation is to help directly the man who makes the laws. We bring home to him and near to him everything which will help him to grasp and understand the great economic problems of the day in their fullest significance, and the legislative remedies which can be applied and the legislative limitations which exist. We must take the theory of the professors and simplify it so that the layman can grasp it immediately and with the greatest ease. The legislator has no time to read. His work is new to him, he is beset with routine work, he has to have conferences with his friends upon political

[1] From a bulletin of the Wisconsin Legislative Reference Department, 1908.

matters, he is beset by office seekers and lobbyists, and he has no time to study. If he does not study or get his studying done for him, he will fall an easy prey to those who are looking out to better their own selfish ends. Therefore we must shorten and digest and make clear all information that we put within his reach.

We must, first of all, get near to the legislator, even as the lobbyist does. I do not mean that we must use the evil methods of the lobbyist, but we must win the legislator's confidence and his friendship and understand him and his prejudices. We must not be arrogant, presumptive, opinionated, or dogmatic. We are dealing with men who are as a rule keen and bright, who as a rule have made a success of business life. We must always remember that we are but clerks and servants who are helping these men to gather data upon things upon which we have worked, as they have worked at their business. We must be careful to keep our private opinions to ourselves and let the evidence speak for itself. We are not doing this work to convert, but to help and to clear up. No busy man can keep track of legislation, and especially complex legislation of our modern times, in one state, let alone half a hundred states. It is our work to do that,— to find out the history of particular pieces of legislation, to find out how a law works, to get the opinions of just lawyers, professors, doctors, publicists, upon these laws and to put their opinions, well digested, in such form that it can be readily used and understood by any legislator even in the whirl and confusion of the legislative session.

Some essentials in carrying on this work may be summarized briefly:

1. The first essential is a selected library convenient to the legislative halls. This library should consist of well-chosen and selected material. A large library is apt to fail because of its too general nature and because it is liable to become cumbersome. This library should be a depository for documents of all descriptions relating to any phase of legislation from all states, federal government, and particularly from foreign countries like England, Australia, France, Germany, and Canada. It should be a place where one can get a law upon any subject or a case upon any law very quickly. It is very convenient to have this room near a good law library. Books are generally behind the times, and newspaper clippings from all over the country, and magazine articles, court briefs, and letters must supplement this library and compose to a large extent its material.

2. A trained librarian and indexer is absolutely essential. The material is largely scrappy and hard to classify. We need a person with a liberal education, who is original, not stiff, who can meet an emergency, and who is tactful as well.

3. The material is arranged so that it is compact and accessible. Do not be afraid to tear up books, documents, pamphlets, clippings, letters, manuscripts, or other material. Minutely index this material. Put it under the subjects. Legislators have no time to read large books. We have no

time to hunt up many references in different parts of a library. They should be together as far as possible, upon every subject of legislative importance.

4. Complete index of all bills which have not become laws in the past should be kept. This saves the drawing of new bills and makes the experience of the past cumulative.

5. Records of vetoes, special messages, political platforms, political literature, and other handy matter should be carefully noted and arranged. Our legislator often wants to get a bill through, and we must remember that he often relies as much upon political or unscientific arguments as we do upon scientific work. He should be able to get hold of his political arguments if he wants, and the political literature from all parties upon all questions should be kept near at hand.

6. Digests of laws on every subject before the legislature should be made and many copies kept. Leading cases on all these laws and opinions of public men and experts upon the working of these laws or upon the defects, technical or otherwise, should be carefully indexed, and, as far as possible, published in pamphlet form, with short bibliographies of the subjects most before the people.

7. The department must be entirely nonpolitical and nonpartisan or else it will be worse than useless. If you have the choice between establishing a political department and no department at all, take the latter.

8. The head of the department should be trained in economics, political science, and social science in general, and should have also a good knowledge of constitutional law. He should, above all, have tact and knowledge of human nature.

9. There should be a trained draftsman connected with the department,— a man who is a good lawyer and something more than a lawyer, a man who has studied legislative forms, who can draw a bill, revise a statute, and amend a bill when called upon to do so. Such a man working with this department and the critical data which it contains will be absolutely essential.

10. *Methods.* (*a*) Go to the legislator, make yourself acquainted with him, study him, find anything he wants for him, never mind how trivial, accommodate him in every way. Advertise your department. Let every one know where it is and what it does. Go to the committees and tell them what you can do for them. (*b*) It is absolutely essential that you get information ahead of time or else you will be of no use in the rush. Send a circular letter out to legislators and tell them you will get any material which will help them in their work before the session begins. The following is a sample of such a circular:

Dear Sir:

The Wisconsin legislature of 1901 authorized the Wisconsin Free Library Commission to conduct a Legislative Reference Department, and to gather and index for the use of members of the legislature and the executive officers of the

state such books, reports, bills, documents, and other material from this and other states as would aid them in their official duties.

The Legislative Reference Library was entirely destroyed by the fire, but much of value to the student of state affairs has been collected. We desire to make such material of the utmost use, and wish you to call upon us for any aid we can give in your legislative duties.

If you will inform us of any subjects you wish to investigate, as far as we have the material, time, and means, we will tell you:

1. What states have passed laws on any particular subject.
2. Where bills for similar laws are under discussion.
3. What bills on any subject have been recently introduced in our legislature.
4. Where valuable discussions of any subject may be obtained.

As far as possible, with our limited force and means, we will send you abstracts of useful material and answer any questions pertaining to legislative matters.

It is not our province to convince members of the legislature upon disputed points. We shall simply aid them to get material to study subjects in which they are interested as public officials.

Make your questions definite. Our work is entirely free, nonpartisan, and nonpolitical, and entirely confidential.

The replies to such a circular give you an idea of what is coming. Work for all you are worth on those topics, send out thousands of circular letters to experts on these topics, subscribe to clipping bureaus if necessary to secure critical data from the public at large. Gather statistics ahead. Carefully search books for significant and concise statements; if to the point, copy or cut them out and index them. Go through the court reports and get the best opinions. (*c*) Get hold of libraries or individuals or professors in other states with whom you can correspond. Speed in getting things to a committee or an individual is absolutely necessary. Do not fail to use the telegraph. Get material,— facts, data, etc.,— and get it quickly and get it to the point; boil down and digest. I can say again, the legislator does not know much about technical terms; avoid them, make things simple and clear. (*d*) Employ, if you can, during the session a good statistician. He can be of great service in dealing with financial bills, in estimating accidents from machinery, or in gathering statistical data of any kind. He should be a man who can work rapidly, accurately, and to the point. Throughout all of this work it is absolutely necessary to get all material absolutely upon the points at issue. (*e*) Make arrangements with all libraries in your city and libraries elsewhere for the loan of books or other material. You should have every sort of an index in your library, as well as catalogues of any of the libraries with which you are corresponding. (*f*) A correspondence clerk and some helper to paste clippings, mount letters, etc., are necessary, especially during the legislative session. (*g*) Keep your place open from early in the morning till late at night. Do everything in your power to accommodate those for whom you work.

I believe that every such library established should try to specialize on one great division of legislation. If one place studies municipal government especially and another labor legislation, it would be a very useful arrangement, as one could go directly to that library having the most expert knowledge on one subject. Of course a journal of comparative legislation is necessary to bring this work into coördination in the future. This department in Wisconsin cost $1500 for the first year and $4500 a year for the last two years, and now has an appropriation of $15,000 a year. The cost is not large because documents are, on the whole, very cheap, and especially because we are near the State Law Library and the State Historical Society, which kindly lend us much of their material.

Scope and Methods

Will such a department help in the betterment of legislation?

Let us consider for a moment how a law is actually made.

John Jones comes to the legislature. He is a good citizen, a man of hard sense, well respected in his community. He enters suddenly from the quiet of his native village into a new life. He comes to live in a new community. He is dogged about and worried by office seekers. His old friends and advisers are not around to help him. He finds that it is necessary for him to learn the ropes. He finds that if he is to represent his district, he must introduce bills, and that he must in some way get those bills through the legislature. He must, first of all, get those bills drawn, and never having drawn a bill in his life and not knowing how such things should be done, it is very hard work for him. He is confronted with two thousand bills on two thousand subjects, legal and economic. Complex questions which are not settled by the greatest thinkers to-day are hurled at his head. Even scientific subjects that the chemist or the physician or the man of science has had a hard time to deal with must be met by our John Jones, and that in the hurry and rush of committee work, and of his efforts to take care of the multitudinous duties placed upon him. If he is honest, he will try to draw his bills himself, or else he pays somebody to do it for him; but the easiest way is to consult somebody else. He finds around him bright men, well-paid lawyers, men of legal standing, who are willing to help him in every way. It is easier to consult these bright men; and often, if he does it, he is lost. It is seldom that he finds a true friend. They are there to look out for their own interests, and John Jones is legitimate prey. To get hold of him is their business. If he is honest and by persistent courage and sterling honesty fights his way through, — pushes his bills on to become laws,— those bills, having to do often with complex, technical subjects, and being drawn by a man unskilled in law, are thrown out by the courts.

Here then is the situation. We see the farmer, our good grocerman, even our small country lawyer, our successful manufacturer, our man of

business, grappling at once, entirely unprepared, with the problem of making laws that represent every phase of industrial life. A few years ago the simple legislation could be more easily handled by these men; but now the great problems of the railroads, the telegraphs, the telephones, insurance, the vast complex things of our modern life, make it simply impossible for one man, however bright or educated he may be, to act intelligently upon one tenth of the subjects which come before the legislature. When some new invention comes into being, legislation must deal with it; when some new situation comes up through the growth of new industries, then some new law must be made restraining or encouraging or in some way regulating these new conditions. It all goes to show how unfitted our old representative government is to meet the conditions to-day, and how utterly helpless any one man is when he has to meet these complex problems.

Besides all these difficulties which I have named, we must not forget that there are other difficulties. The federal Constitution was in a way a simple instrument when it was made, compared to what it is now. The unwritten constitution of the country, the many decisions made by our courts, have tended to bind the action of the state and the legislators of the state hand and foot. Again, the increasing distrust of our legislatures by our citizens has resulted in immense state constitutions which are nothing more than compiled statutes, filled with innumerable restrictions upon the action of the legislator. He is restrained in every way by the federal Constitution, and by his state constitution, and by the hundreds and hundreds of cases interpreting nearly every word and nearly every phrase in every law. Is it any wonder then that there is a cry that the supreme court is usurping legislative functions and is defeating the will of the people? Does it seem right that our legislative opinion should be molded by private interests because private interests alone know how to present their case? Does it seem right that the only help which the legislator gets in his great need is that of the people who are seeking gain from the very laws he is making, or who are trying to prevent the making of effective law?

A committee is often a judicial body. It sits in judgment upon private bills. It gives rights and franchises that make men wealthy or deprive men of their property. Yet this court hears often but one side of an argument, and has no means of investigating the truth or untruth of one statement made. Not only that, but it is subjected in its determinations to a hundred influences to which no judge is subjected. Would we allow such a state of affairs in our private business? Would we tolerate it in our judiciary? How are we prepared to make that still greater activity of government which some call "paternalism"? Why, the powerful interests do not have to resort to bribery! Their experts can win by the irresistible force of argument alone. They must hold the balance, for they have the brains of the land and pay well for them.

Is it any wonder that many good people throw up their hands with joy and say, "Thank God the legislature is over"? It is not a thing to be joked about. Our papers make fun of the legislature and its "freak" legislation, but it is a mighty serious state of affairs when a people loses confidence in its governing body.

The revelations of graft and corruption of the last four years should convince us all that we are up against a serious condition, and that we must seek a positive remedy of a more fundamental kind than has yet been proposed. If these are the conditions under which our legislative opinion is formed, is it any wonder that the will of the people is constantly defeated? Is it any wonder that our laws are poor? Is it any wonder that the clamor of public opinion fails to be heard within our legislative halls? Is it any wonder that the making of needed laws goes on so slowly? Now what is the remedy for all this? We look around about us and find our judiciary composed of the high men of the state. We have the most profound respect for our judiciary. We are satisfied with it. Our administrative bodies have not yet reached that high standard, but we are every day developing administrative bodies which are, notwithstanding recent revelations, becoming more and more fit to take charge of the business of the state, but how about the legislature? Does it not seem reasonable that the law, which is the expression of the will of the people and upon which good administration is founded, should be scientific,— should be based upon the best experience of all mankind? If our administration is to be good administration, does it not seem ridiculous that the supreme court, the highest legal talent in the state, should go on day after day, year after year, turning out decision after decision upon laws which are made often by men who have never seen a law book? Does that seem like business? Does it seem right that our fundamental law should be left to these haphazard conditions? Does it seem reasonable that all the talent should be used in interpreting laws, in curing their defects, and that absolutely nothing should be done in a scientific way in the making of these laws? Why, in building any kind of a structure to-day we use an architect! The construction of a law is a far harder task than the criticism of it, or even the interpretation of it. It involves the interpretation of it. It involves a knowledge of the theory of government. It involves, because of the enlarged sphere of government to-day, a sound knowledge of economic conditions.

We have heard a great deal of condemnation of the legislature. It is easy and popular, too, to sneer and censure and to criticize, but we have heard very few suggestions as to a remedy put forth.

If private forces maintain bureaus of information for representatives, let us have public information bureaus, open to private and public interests alike. If it is hard to get information because of the great variety of subjects now coming before our legislators, the only sensible thing to do is to get experts to gather this material. If business interests have

good lawyers to look after their legislation, the people should secure the same kind of men to help their representatives. If the business interests secure statisticians, engineers, and scientific men, then the public should do likewise. If great judges and great lawyers are constantly working upon the problems of interpretation of laws, then surely men of equal ability should be consulted while those laws are being constructed.

This work is now going forward with great strides, and state after state is taking it up. The legislators give it the most enthusiastic support. In this work is the great future of the state library, because the state libraries are the legal storehouses of knowledge for our state officers and legislators. The basis of the work is essentially the storing and keeping of knowledge ready for use, and is not that the highest aim of a library? Already the Carnegie Library at Pittsburg has a specialist to answer questions upon scientific subjects. All the state library needs is specialists of a like nature for legislative subjects. Again, the state library is within the legislative circle of which I have spoken. It is now doing this work to some extent, and will have only to change its methods and get specialists to accomplish the full work.

Again, the organization of a new department in the statehouse and the duplication of books and other material should be avoided in the interest of economy. The state library is established, has the material, and, what is better, is generally out of politics. An extension of the functions of the state library is all that is necessary in most cases.

Now what do we expect from the successful operation of a system like this? We hope that all legislation can be made better and be put upon a more scientific basis. We look upon this as simply a pure business operation. No one here would buy land in Texas without ever having seen that land. You might buy land in a lake or in the bed of a river, if you should use such a process as that; you would at least get some one to look up your title. But we leave our legislators to copy a Texas statute that may be twenty years of age, may have been modified twenty-five times, may be entirely unsuited to our conditions, and which may be in the end unconstitutional,— we let our legislators incorporate such statutes in our statute books without a protest. It seems merely common sense that we should get all possible knowledge relating to that statute for the use of our legislators. In this way legislation cannot help being bettered; in this way the dearly bought experience of one state is used for the betterment of conditions in another state. In this way the best there is can be culled out from the statutes throughout the country and used for the benefit of our people.

There is a great cry against our overloaded constitutions. Our constitutions have been purposely overloaded because the people who made these constitutions wished to put certain things in them which could not be overturned by the caprice or corruption of legislators. As time goes on and people find that there is a scientific department working with the

legislature, then the people will again gain confidence in the legislature and will again trust the legislature.

There is a widespread agitation at the present time for centralization and nationalization,— a movement which strives to have one after another of the state functions taken over by the national government. We hear agitation about federal life insurance, we hear agitation about national incorporation acts, federal food acts, and various forms of federal supervision of one thing or another.

I only want to point out to you that as our laws are made better in any way these movements will stop. This great danger will be overcome. The best laws are those laws which are near to the people who make the laws, and the only means for saving our local-option system of state government — the only means of keeping the federal government at Washington from controlling our affairs — is to make our state laws better and better; and the only way in which they can be made better is to have scientific method in the making of them. Every business method should be used and technical clerical help should be secured in order that the man who makes the laws can have the knowledge before him necessary to make laws good and to make laws just and to make laws stand for all time.

If our state legislature gains in the confidence of the people, so will our supreme court and our judicial bodies gain in the confidence of the people. Our courts will not be called upon to make decisions which apparently defeat time and time again the will of the people. They will not be called upon to turn down law after law which has been put upon our statute books often by prolonged and patient struggle. The laws will be better before they come to the courts. Prevention is better than cure, and every effort we can put into prevention in this case will make our laws better, and will make it easier for our courts to decide upon the true merits of the laws. Decisions based upon technicalities will be less in number. Our judiciary will continue to be respected and honored.

Says the Montana Bar Association in a recent report: "The time of the court is consumed in hearing discussions upon statutory enactments and determining what law is in force and what has been repealed. Litigation is thus delayed, additional expense engendered, and private rights rendered insecure." What is the remedy for such conditions? Do these conditions not demand that the same skill used in interpreting the law should be used in its construction?

We have recently seen the work of the Armstrong Investigating Committee in New York. No insurance law ever passed in this country had so much effect upon insurance regulation. That report was made by legislators and not by state officials. We are constantly crying out to-day against the innumerable state boards that are being created. Boards have been created licensing barbers, and licensing every trade and occupation. We object to the increase of commission government, and yet commission

government has increased because it has been felt for some time that the only way of enforcing laws, the only way of doing special duties, was to do them by the creation of new boards. And yet this Armstrong committee shows us a way of making laws and enforcing laws, which is better than boards and commissions. If we have some department working with our legislature, and have that department work outside of the sessions with investigating committees, then we can be sure that there is always a check upon the action of our boards and commissions, and that there is always at hand a remedy for evil in the hands of the people themselves. They can always ask for an investigating committee, and the report of that committee will result in good sound law.

At the present time, in nearly all of our states, an able lawyer will go before a committee composed of good farmers and good merchants, and sometimes, though he may not speak the truth, that committee is absolutely at the mercy of that man. He can tell them privately or before the committee that a certain bill is unconstitutional, or has been a failure, where tried. He can defy individual members to answer him. He has behind him sometimes many clerks to gather statistics of all sorts for his use before that committee. What has that committee to do under the circumstances, and what can the individual member of that committee do under those circumstances? What could you do under those circumstances? Of course the committeeman does not want to make himself ridiculous, and sets the business forth in a half-hearted report, or acquiesces in the statements of the attorney before the committee. If a department existed entirely nonpartisan and nonpolitical, composed of men of ability, then there is no reason why that committee could not require briefs to be filed before them and ask the help of this department. Then it would be harder to deceive by misstatements. Then any one could investigate for himself if he was honest and wanted to do his duty.

As to our own department in Wisconsin, I do not want you to have the impression that we are reformers, that we are trying to influence our legislators in any way, that we are upon one side or another upon any question, or that we are for or against somebody or something. We are merely a business branch of the government. I do not want you, either, to think that we are dictating legislation. We are not. We are merely servants of the good, able, and honest legislators of our state. We are merely clerks to gather an index and put together the information that these busy men desire. It is merely a business proposition. I do not want to deceive you, and to have you think that we have done more than we have in Wisconsin. We have as yet but a small department. But I believe that this work has had a decided effect upon legislation in Wisconsin. I can say truly it is popular with all members of the legislature. We have answered thirty or forty questions a day upon various topics. As soon as a question relating to the quality of diphtheria antitoxin or some other difficult subject comes before the legislature,

hundreds of letters go out from our department to the great schools of medicine, to the great hospitals, and to the scientists who have knowledge upon that subject. The results of their investigations are placed before our committee in concise form. So question after question is investigated in as scientific a manner as our time and means allow us. It is our duty to gather every bit of scientific data from whatever source. The legislator sometimes does not know where he gets the information. The professor of economics, the professor of political science, the public man, the chemist or scholar, does not know where it goes. The great body of public men throughout the country can be drawn upon for information to help our legislators. Committees, too, realize the worth of this research work, and a large number of the bills before them are investigated by this department. Committees working upon abstract and technical subjects have at their hands in concise form letters and opinions and other data from all over the country, from experts upon the particular subjects on which the committee is working. We feel that we have done very little, but that at least we have done something where nothing was done formerly.

Sources of Material

Most of the material essential to the Legislative Reference Department can be readily obtained, with comparatively little cost. Probably half is documentary in its nature, and a request forwarded to the proper source almost invariably meets with prompt and generous response, from both United States offices and various state departments. An appeal to the Secretary of State or to the heads of the various state departments for copies of the reports, bulletins, or publications of a state is never refused, if it is known that the value of such documents is appreciated and that they will be made available for public use. This class of material costs nothing except postage and occasionally express charges, and is of the utmost value and unobtainable elsewhere.

The proceedings of the various local and national societies, together with their special reports and bulletins, are very desirable, and many of these may be obtained by applying either to the secretaries or to the local members, who will be glad to furnish such material. Societies which deal with economics, political science, law, commerce and industry, municipal problems, and labor organizations have been formed to investigate these subjects and to forward the interests of all concerned therein. They are glad to have their ideas and policies placed where they will be given publicity and be used most profitably.

By keeping in close touch with the views and interests of the legislators we learn of many individuals whose interests are along specific lines and who devote their time to special subjects. To these men, as individuals, we apply for helpful suggestions, not only as to material but also as to criticisms upon particular laws, and from them we receive

many gifts of pamphlets and material which could scarcely be obtained in any other way.

The newspapers furnish a source of inexpensive and invaluable material. Clippings from the newspapers of different parts of the country should be arranged and classified the same as pamphlets. Perhaps some local newspaper will be willing to contribute its exchanges. In this way one can keep the department in touch with public opinion, not only in its own locality but throughout the entire country.

There are some periodical publications which can be secured as gifts or at very small expense; these may be clipped and the material put upon the shelves according to subject. A useful subscription list should be judiciously chosen, and care must be taken to keep this list within a reasonable amount.

Finally, if information upon a particular phase of a given subject is wanted, in order to meet some special demand, a circular letter sent to experts or officials is to be recommended. This brings information absolutely unavailable in books, with practically no cost, and the returns may be mounted and put into pamphlet form immediately.

There are some books which one must buy, but a most creditable and useful collection can be made at a cost so small that it puts a department of this type in a unique position in the library world.

The important consideration in the gathering of material is not the amount of money involved, but the patience and time required in writing many letters to the proper sources, and the judgment and discretion required in retaining that which is truly "worth while."

METHODS OF LEGISLATION[1]

To explain the importance of the House "organization" it is necessary to discuss the parliamentary rules and tactics used in steering a bill through the House. The road is long and hard without the friendship of the committee to which the bill is referred, and of the Speaker, who can wield the gavel to help or hinder its progress. The bill must go to committee, be printed, be reported out to pass, and be read on three different days. It may be amended after second reading; it must be engrossed before third reading. Then it is in the order of passage, and requires in the House seventy-seven votes to pass. With a friendly House and Speaker it may, on introduction, by unanimous consent (wholly dependent on the Speaker's hearing objections if made), be read a first time without reference to a committee, read a second time on the following day, and on the third day passed. This is the short road. The bill to provide for the incidental expenses of the assembly invariably follows this route. A committee may itself prepare and introduce a bill. In this way the death-limit bill was introduced in the Senate and passed in forty-eight hours.

[1] From a bulletin of the Legislative Voters' League of Illinois, 1903.

On the other hand, consider the petty annoyances to which a decent member outside the "organization" may be subjected, and the methods by which legitimate legislation, backed by him, may be blocked. The bill goes to an unfriendly committee. The chairman refuses to call the committee together, or, when forced to call it, a quorum does not attend. In case a quorum attends, the point may be raised that the bill is not printed, or the chairman may fail to have the original bill with him. Action may be postponed on various pretexts, or the bill may be referred to a subcommittee. The committee may kill the bill by laying it on the table. On the other hand, the committee may decide that the bill be reported to the House to pass. Then a common practice is for the chairman to pocket the bill, delaying to report it to the House till too late to pass it. When finally reported to the House, it goes on the calendar to be read a first time in its order. Then begins the advancing of bills by unanimous consent, without waiting to reach them in order. Here is where the "organization" has absolute control. Unanimous consent is subject to the speaker's acuteness of hearing. His hearing is sharpened or dulled according to the good standing of the objector or of the member pushing the bill. If one not friendly to the House "organization" wants to have his bill considered over an objection, he must move to suspend the rules. The Speaker may refuse to recognize him, or may put his motion and declare it carried or not carried, as suits his and the "organization's" desires. So the pet bills are jumped over others ahead of them on the calendar, while the ones not having the backing of the House "organization" are retired farther and farther down until their ultimate passage becomes hopeless. If the bill of the independent member reaches second reading, it may be killed by striking out the enacting clause or by tacking on an obnoxious amendment that makes it repulsive to its former friends. A referendum requiring not a majority of those voting on the bill, but a majority of all the votes cast at the election to adopt it, is a new and favorite method of shelving a bill by amendment. To carry out the will of the "organization," the Speaker declares amendments carried, or the contrary, on viva voce vote. Demands for roll calls are ignored by him in violation of the members' constitutional rights. This is called gaveling a bill through. Formerly the gavel was used to carry through political measures of the majority party and to prevent obstructive and dilatory tactics of the minority party. By a gradual growth it has come to be used to help or defeat legislation in which the "organization" has an interest, although the majority may have a contrary view. What the Speaker declares the clerk must record, and what the clerk records no court will set aside.

If a bill comes through this critical stage of amendment safe and sound, it goes into the engrossing committee and becomes the victim of the chairman. He, in turn, may neglect to report it back until its place on the calendar is so far behind that a single objecting member (subject to the Speaker's hearing) may prevent it ever reaching a vote.

The "organization's" control of a bill is not ended on roll call for passage. Here the members cannot escape a record. They must come out in the open, voting for or against it on roll call, or practically vote against it by remaining silent. It must have seventy-seven votes to pass. Failure to preserve a record showing a constitutional majority voting for it would invalidate the act. But the "organization" with the machinery in its hands may hold back the announcement of the vote while active work on the floor among members may change votes or persuade those not voting to support the bill. If its defeat is desired, the announcement is made promptly, leaving no time for such work.

The foregoing will explain the importance of capturing the House "organization." There are fifty-seven committees to be appointed, and to fill them the Speaker must make over a thousand assignments. He and his backers use these as inducements to members to join their forces. In addition he controls the House patronage. The same system applies to the Senate. The legislative pay roll is created on the first day's session, and in the confusion and, to the new members, novelty of the situation, resolution after resolution is put through, creating a needless and extravagant pay roll. At the same time a bill to provide $100,000 for this pay roll is started on its way to the Senate. Of this sum $75,000 used during the last session was clear waste, to pay for positions not provided by statute and not necessary to the work of the session. Ninety-three janitors and seventy policemen formed a portion of the two hundred and sixty-one sinecure jobs paid for out of this fund, and the only service required was to appear at the auditor's window and draw pay. The pay roll, by judicious distribution, was used to further the ends of the "organization."

After creating this pay roll the purely political play of setting up the pins of the "organization" commenced, while the state paid the enormous daily expenses of the session. Forty days were consumed before a single committee was appointed. Their make-up had to be carefully considered, not with any regard to public interests, but with a view to rewarding friends and punishing enemies. With a clique Speaker and a clique organization of committees it was thought the majority could be throttled. Meantime not a stroke of work was done except to pile up bills for the consideration of committees when appointed. Daily sessions of an hour's length were held on three days of the week during this time. Then a week after the appointment of the committees the first House bill passed. And still every effort in committee and on the floor was made to keep important legislation, excepting appropriation bills, in the background. This was done with a view to piling up the business for the last two weeks of the session, when, in the crush and confusion, the "organization" could advance its own bills and kill all others. Aside from formal bills to appropriate money and to fix court terms in some counties, no important legislation passed the House until seventy-eight days of the session were gone. Then the State Civil Service Bill, with its vitals torn out, was sent to the Senate.

Practically the House did not get down to business until the time to adjourn had been fixed. On March 31, nearly three months after its first meeting, it began to hold two sessions a day and to meet five days in the week. This program seemed merely to enliven some of the worst committees, and they began sending out their "regulators." A "regulator," "holdup bill," or "sandbagger" may be defined as a bill to regulate, tax, license, or prohibit certain industries. The manipulation and juggling of these bills has become an industry in the legislature. Of the eight hundred and seventy-three bills introduced in the House, over one hundred were bills of this nature. They came from about fifteen members, Republicans and Democrats, and mostly from Cook County. Many of these bills were greeted with a smile of recognition as they made their appearance from day to day, dug from the records of former sessions. The mechanical operation of a typewriter prepared them for renewed "usefulness." Some of the legislative clique had not the ingenuity or experience necessary to the selection of a "good proposition," and it is well known that such measures were handed them for introduction by experts in that line, with a promise of some of the fruits. The handling of the bills in committee and on the floor was left to the more astute and experienced members of the clique.

Most of such bills were sent to the committees on municipal corporations, corporations, railroads and license, and halted there in the expectation of being put to sleep. Their nurses expected a handsome consideration for their services. They had brought them into life and were their tender caretakers. The clique had been given absolute control of these committees, the decent members being a small minority. This was the clique's reward for the support its Republican members gave to the "organization" in electing the Speaker. Every one, including the Speaker who appointed them, and the committee that dictated to him their appointment, knew their sandbagging purposes. Their bills met none of the obstacles so easily placed in the way of broad constructive legislation in these committees. The proceedings of these committees were conducted without regard to parliamentary rules or a sense of fair play. Their complexion and methods smacked of the old-time precinct meeting of political heelers. Decent members, coming to the legislature with ambition and a desire to serve public interests, though Republicans, were relegated to inactive positions as members of the minority on these committees. Here they writhed at spectacles of demoralization they had never before witnessed. Jokes were bandied about and the wink exchanged when a notorious "sandbagger" was under discussion.

The control of four such important committees gave the disreputables a powerful leverage for bluff. Here their holdup measures were killed, postponed, or reported out, to suit their convenience. When sent to the House through the cowardice or friendliness of a complaisant Speaker, they were juggled on the floor to positions of vantage that were intended

to scare the financial interests affected. Yet in the few instances, when such bills came to a final vote, they were promptly killed by the honest majority.

Some members and some of the public are indifferent to this venal practice, because it "merely pulls the leg of some corporation." They overlook the fact that these bills crowd the calendar, force trading with venal men for votes, involve a principle, and result in the selling of souls. The few members who come to the legislature with the deliberate purpose of indulging in this illegitimate business are like rotten apples in a barrel. They taint the whole. It is true that few begin their career with this deliberate purpose. Yet the fact remains that in every session these bills are introduced to be used merely as clubs to knock down the persimmons in order that the hungry few may gorge themselves on the rotten fruit. It is further true that men of substance, who can justly claim to be good fathers, husbands, or neighbors, lend themselves to this slaughtering of the public good for private gain, either through cowardly weakness or because the almighty dollar is a stronger argument than a clear conscience. To one who has obtained a peep behind the scenes the pathos of the whole matter lies in the fact that in forty-nine cases out of fifty the money that has been put up to avoid vicious legislation is worse than wasted. If the vicious manipulator can be made to understand that every time he puts up money to obtain or prevent legislation where it cannot stand on its merits, he is simply bartering in human souls, his own included, the use of unlawful money can be kept out of our state legislature. If this is done for one session, more than 90 per cent of civic evil will disappear. This reform cannot be brought about by more stringent laws. It must be brought about by stirring public sentiment to the point where even the just suspicion of one's connection with boodling, either as one who furnishes the funds or as the director of an institution that will shut its eyes and wink at corruption, will cause one to be shunned by all honest men.

Even a casual observance of the workings of the legislature will show the absurdity of a party organization of the House. Party lines have little to do with the *actual work* of the legislature. With its *organization* they have no concern. There were only two strict party votes during the session: the first to elect a United States senator; the second to form a Republican supreme court district. Yet the pooh-bah of partyism was used to divide honest men, and the party caucus adhered to with perfunctory formality. To reform the legislature, partisanship and factionalism must be laid aside to the end that a Speaker be elected who will respect his oath of office, and who will appoint committees promptly and on lines of honesty and fitness. An important factor in accomplishing this reform will consist in abolishing the vicious pay roll, a growing evil and a factor in the organization of both House and Senate. With such reforms the work of the legislature will be sifted to the consideration of legitimate

legislation; deals, bargains, and trading of votes will, to a large extent, be eliminated, the sessions shortened by business methods being pursued, and the legislature will become, what it is now only in theory, a truly deliberative body. The election of men on their merits, regardless of party, will accomplish this reform. No mere laws or system of rules will do it. The question is up to the people of Cook County.

THE LOBBY[1]

By Governor William E. Russell

One thing above all is necessary to make law the true expression of the people's will. Broadening and protecting the suffrage, reforming and purifying elections, will fail of this purpose unless the lawmaking power is protected from insidious and corrupting influences, which tend to control legislation against the people's interest and to impair public confidence in its impartial enactment.

There exists in this state, as in other states, an irresponsible body known as the lobby, representing or preying upon special interests, which professes and undertakes for hire to influence or control legislation. Its work is wholly distinct and different from the advocacy of one's cause in person, or by counsel or agent, which is the constitutional right of every one. It seeks often to control nominations and elections, and to subject the individual legislator, directly or indirectly, to secret and improper influences. It throws suspicion upon the honest and temptation in the way of the dishonest. Professing power greater than it has, it frequently extorts money as the price of its silence or unnecessary assistance. It has initiated legislation, attacking the interests of its clients in order to be hired to defend those interests. It has caused the expenditures of large sums of money to obtain or defeat legislation. It cares little for the merits of a measure or the means employed to make it successful. In my judgment improper measures have, by its influence, been made law, against the public interest, and just measures have been defeated. These criticisms have not been based upon rumor or conjecture, but upon facts reported after most thorough investigation by your predecessors, who denounced the evil in unsparing terms and diligently sought a remedy.

In 1887 they spoke of the methods thus employed as "a struggle for success without regard to means"; "causing a growing demoralization"; and they added, "the venality and corruption which these practices encourage, tending to defeat that right and justice which the state is bound freely and without price to bestow, are a reproach to a free people." In the same year the governor, vetoing a measure because of the lobby influence, described the lobby as "a pernicious system," and its methods as "a monstrously bad and corrupting practice." In 1890 a

[1] From a message to the Massachusetts legislature, January, 1891.

committee of investigation of the House reported: "It is a fact beyond denial that a body of professional lobbyists has for years formed part of the machinery of legislation, . . . and has been growing in numbers and influence," and again they denounced its methods. The evils of the lobby have become so flagrant and disgraceful that for the purity of legislation, the protection of the legislature, and the fair name of our commonwealth, they demand your serious consideration and some stringent and radical remedy. This is a matter which especially concerns the legislature, and therefore one which the executive approaches with some embarrassment. Yet I feel I should be derelict in my duty if I failed to do all in my power to aid you in its solution.

It is far easier to state the evil than to suggest the remedy. Clearly it is impossible and improper to prevent a constituent or any other person from having the freest access to a legislator. This constitutional right guaranteed to the people gives opportunity to the lobby to do its work. Prevention by nonintercourse is therefore impossible. Prevention by publicity is possible, and I would suggest for your consideration whether a remedy may not be found in this direction by making it easier than it now is publicly to investigate the methods used and money spent on pending legislation; and also, by giving power to some proper officer, before a measure finally becomes law, to demand under oath a full and detailed statement as to these matters. The fear of publicity, and through it of defeat, may stop improper practices by making them worse than useless. Your immediate predecessors, with an earnest desire to cure the evil, and believing in the remedy of publicity, passed an act requiring all counsel and agents employed by any special interest on matters pending before the legislature to be registered, and a statement under oath of all expenses incurred to be made within thirty days after the adjournment of the legislature. I believe that good will come from this act if fairly and thoroughly enforced, but that it falls short of being a sufficient remedy. It makes public the names of all persons employed, but not the acts of the lobbyist. It makes public the expenses incurred, but too late to affect the legislation for which they were incurred.

I ask you also to consider whether something cannot be done to relieve the legislature of much work that seems to be honest and unnecessary, to prolong its sessions, and to give life and strength to the lobby. Recent amendments to your rules have been made, I am informed, with this purpose. You may deem it wise to make further provision for an earlier introduction of business and for its more systematic conduct. Any steps which would tend to reduce suggested legislation to a specific form, and to give the fullest possible notice to the public of the exact status of any matter pending, would, I am confident, restrict the employment of the lobby.

LOBBYING[1]

State of Wisconsin, Executive Office
Madison, May 25, 1905

To the Honorable, the Legislature:

Upon the assembling of the Senate and assembly in joint session at the opening of this legislature on the twelfth day of January, 1905, in the message then submitted, among other things presented for your consideration, I said:

I am not unmindful of the fact that members of the legislature are the agents of their constituents; that they must ever be ready to be made acquainted with their wishes and with the interests of the public. But that a system of lobbying, more reprehensible in its character than has yet been suggested to the public, has been maintained about this legislature for many years is well known to every man in public life. That it is desirable to put an end to this evil, all will agree. That it is possible, all should be anxious to demonstrate.

I desire to be distinctly understood as favoring the fullest and freest discussion before committees, and, under proper regulations, before either or both branches of the legislature, by individuals or the representatives of interests affected, or which claim to be affected in any manner by proposed legislation, but *I urge upon your consideration the enactment of a law that shall make it an offense, punishable by the heaviest money penalty and by imprisonment as well, for any lobby agent or lobby representative, employed and paid for his services by others, to attempt personally and directly to influence any member of the legislature to vote for or against any measure affecting the interests represented by such lobbyist.*

No one acquainted with the facts will venture to deny that the lobby has been very potent in legislation for many years in Wisconsin.

Session after session the schoolbook lobby has suppressed or defeated legislation inimical to the interests of the schoolbook monopoly.

Our laws upon trusts are weak and impotent. They serve merely to foil the enactment of something better. For three successive sessions I have urgently recommended revision and have submitted plain and specific recommendations for effective legislation. A hostile lobby has found a way to block all legislation upon the subject.

A telephone monopoly has for years, through the services of a paid lobby, prevented the enactment of a statute which would have given the people of this commonwealth a competitive service and assured them a reasonable rate.

Without going back over that period of time covered by the impudent boast of a railway lobbyist, proclaimed in this capitol, that "No bill has been enacted into law during the sixteen years last past in the interests of the people when objected to by the railroads," — without going back further than the service of many members of this legislature extends,

[1] Message of Governor La Follette to the Wisconsin legislature, May, 1905.

it admits of no denial that the railway lobby defeated the bill to increase railway taxes in 1899, that it defeated the bill to increase railway taxes again in 1901, that it defeated the bill to create a railway rate commission in both of those sessions and again in 1903. The railway lobby maintained at this capitol since 1899 has cost the people of Wisconsin millions upon millions of dollars.

At this session, and at every session for years, paid lobbyists have been employed about this legislature, by the railroads, who are incompetent to argue any proposition before a legislative committee. They are a grade of men with whom the railway companies would not trust the trial of a petty damage suit in a justice court. They dog the footsteps of legislators in and out of the capitol, they follow them to their rooms and hotels, they are free with entertainment. It is their business more especially to see legislators personally. Their special talent seems to fit them more particularly for private argument. Their presence is an annoyance and a nuisance. Their employment here should constitute a statutory offense.

The experience in Wisconsin is duplicated in every state in the Union where effort is made to emancipate legislation from corporate control. Governor Larrabee, writing of the long struggle which preceded the establishment of the Iowa Rate Commission, said of the railway lobby the following: "If the items annually expended upon railroad lobbies were reported, these lobbies would soon be frowned, or even hissed, out of legislative halls."

This legislature can at this session, — and who will assume the responsibility of saying it is not high time that it should at this session put all paid lobbyists under regulations that will make such scenes as have been notorious in the capital city of this state for years, impossible for all time to come. I would neither recommend nor approve of a law interfering with free and full public discussion of all measures of proposed legislation. Every opportunity and every courtesy should be extended to those who favor and to those who oppose any pending bill for open public discussion, before committees and in either chamber before legislators and the public. Every legitimate argument which any lobbyist has to offer, and which any legislator ought to hear, can be presented before committees, before the legislators as a body, through the press, from the public platform, and through printed briefs and arguments placed in the hands of all members and accessible to the public.

Corporate interests can maintain a strong lobby composed of able men at the capitol throughout the entire session. Those who would be heard in opposition cannot. How unjust it is to hold a public hearing, invite both sides to present arguments, and then when the hearing is over to allow the permanent lobby to continue the discussion with individual legislators personally through weeks of the session thereafter, without those opposed being present to hear and refute arguments.

Leaving aside all question of any improper suggestion or inducement being presented in a personal or private interview with a legislator, consider how unjust it is to the opposition and to the public to accord to one side such an advantage when it is denied, or impossible, to the other.

The legislation which I most earnestly recommend is right in reason and is sanctioned by the highest authority. The most eminent writer in this country upon constitutional law has said:

> The law also seeks to cast its protection around legislative sessions and to shield them against corrupt and improper influences, by making void all contracts which have for their object to influence legislation in any other manner than by such open and public presentation of facts, arguments, and appeals to reason as are recognized as proper and legitimate with all public bodies. While counsel may be properly employed to present the reasons in favor of any public measure to the body authorized to pass upon it, or to any of its committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for this service, yet to secretly approach the members of such a body, with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views, is improper and unfair to the opposing interest; and a contract to pay for this irregular and improper service would not be enforced by the law.

The chief justice of an appellate court, ranking second to none in the Union, says in a leading opinion on the subject, the following:

> By the regular course of legislation organs are provided through which any parties may fairly and openly approach the legislature, and be heard with proofs and arguments respecting any legislative acts which they may be interested in, whether public or private. These organs are the various committees appointed to consider and report upon the matters to be acted upon by the whole body.
>
> When private interests are to be affected notice is given of the hearings before these committees, and thus opportunity is given to adverse parties to meet face to face and obtain a fair and open hearing. And though these committees properly dispense with many of the rules which regulate hearings before judicial tribunals, yet common fairness requires that neither party shall be permitted to have secret consultations and exercise secret influences that are kept from the knowledge of the other party. The business of "lobby members" is not to go fairly and openly before the committees and present statements, proofs, and arguments that the other side has an opportunity to meet, and refute if they are wrong, but to go secretly to the members and ply them with statements and arguments that the other side cannot openly meet, however erroneous they may be, and to bring their illegitimate influences to bear upon them. If the "lobby member" is selected because of his political or personal influence, it aggravates the wrong. If his business is to unite various interests by means of projects that are called "logrolling," it is still worse. The practice of inducing members of the legislature to act under the influence of what they have eaten and drunk at houses of entertainment tends to render those of them who yield to such influences wholly unfit to act in such cases. The tendency and object of these influences are to obtain by corruption what it is supposed cannot be obtained fairly.

We have a statute requiring lobbyists to register with the Secretary of State before engaging in the business of lobbying. If lobbying privately and secretly with the individual is made an offense, it will go far to prevent any lobbyist from seeing or attempting to see a legislator alone. If, after a hearing is ended before any committee, further information is desired by the committee, or any member or members of the committee, or of the legislature, lobby counsel upon both sides will always cheerfully respond to a call for a further public hearing in committee rooms or in either chamber of the legislature. No fear need be entertained that the members will be denied all of the information which it is possible for those interested in legislation upon either side to furnish.

To exclude lobbyists from the legislative halls may promote the comfort and convenience of members of the Senate and assembly. It would, in no measure, tend to eradicate the injustice and evil resulting from private and secret lobbying. Indeed, it might tend to increase instead. No. This legislature owes it to itself and to the people of the state to destroy the secret lobby, root and branch.

Under the vigilant eyes of an awakened public the operations of the lobby have not been so openly offensive to decent morals at this session as at previous sessions.

But the personal appeals of paid lobbyists have been persistently made to legislators throughout this session after hearings have been closed, after those representing the other side have retired from the capitol and from the city, believing, as they had the right to believe, that the discussion had closed.

Personal, private lobbying is wrong in principle, and is absolutely certain to be vicious in practice. No legislation which has been enacted will be secure, and that which the public interests will require in the future will never be reasonably certain of attainment until the secret lobby with its misrepresentation and its wrongdoing is prohibited by law.

I commend to your considerate judgment the enactment of a statute making it a penal offense for a paid lobbyist to approach a legislator privately or personally upon any matter which is the subject of legislation.

Respectfully submitted,

ROBERT M. LA FOLLETTE, *Governor*

POPULAR GOVERNMENT IN OREGON[1]

BY SENATOR BOURNE

Mr. President:

The justice of all laws rests primarily on the integrity, ability, and disinterestedness of the individuals enacting them, those construing them, and those administering them. On this assumption I believe the remarks

[1] From the *Congressional Record*, May 5, 1910.

I intend to make have a bearing on all legislation, and hence do not hesitate to present them now while we have the interstate commerce bill under consideration.

I think all will concede that the times seem awry. Unrest exists throughout the civilized world. People are speculating as to the causes. Daily uncertainty grows stronger as to future events.

In my opinion the basic cause is that people have lost confidence in many of their public servants and bitterly resent attempted dictatorship by "would-be" political bosses and representatives of special interests, who desire to direct public servants and legislation for their own selfish interests rather than assist in the enactment of laws guaranteeing justice to all and special privileges to none.

Successful and permanent government must rest primarily on recognition of the rights of men and the absolute sovereignty of the people. Upon these principles is built the superstructure of our republic. Their maintenance and perpetuation measure the life of the republic. These policies, therefore, stand for the rights and liberties of the people, and for the power and majesty of the government as against the enemies of both.

The people have been shocked by the number of business and political exposures which have been brought out in the last ten years.

At the time of Mr. Roosevelt's inauguration the tendency was to measure national prosperity by property rather than by personal liberty. The commercial force of society was rapidly throttling the police power of the government. Political machines and bosses dictated the legislative and administrative destinies of many communities and states. Mr. Roosevelt, with his experience in practical politics, familiarity with governmental operations, inherent honesty, dynamic energy, and limitless courage, demonstrated that he measured up to the needs of the time, and assumed leadership for reinstatement of the police power of the government in supremacy over the commercial force of society. To him belongs credit for reëstablishment of these two great forces in their proper relative positions. He awakened the public conscience, and the result is a struggle throughout the nation between the advocates of what I would term "popular government" and the advocates of delegated government.

Direct Selection of Public Servants

In many instances the people have lost confidence in their public servants, the same as many stockholders have lost confidence in corporation management. The remedy in government is the direct selection by the people of their public servants, with the resultant accountability of the public servant to the people, and not to a political machine or boss. I purposely use the word "selection" rather than "nomination," for to my mind it more clearly expresses the idea of the responsibility of good

citizenship. Selection implies the careful investigation of all and the resultant choice of one. The remedy in corporation management is rigid responsibility to government; equal obedience to laws and equal accountability to stockholders, giving the government and the stockholders the fullest publicity of its operations, including absolute honesty and simplicity of its accounts, thus protecting the rights of the people and insuring to all the stockholders proportional enjoyment in the fruits of successful management.

Mr. President, I will endeavor to deal in my remarks with what I believe to be the great issue, not only in this country but throughout the civilized world, namely popular against delegated government.

Much has been said in favor of representative government. I believe in a truly representative government, but where the selection of public servants is left to a political machine or boss, as is frequently the case under our convention system, the tendency is toward misrepresentative, and not a truly representative, form of government, notwithstanding the election is supposedly by the people.

People capable of Self-government

There are doubtless some people who honestly believe that the people as a whole have not reached the stage of development qualifying them individually to participate in government. Others whom I credit with the intelligence which I have seen manifested by them in other directions assert the inability of the people to govern themselves as an excuse rather than a conviction; but I, Mr. President, from thirty years' experience in practical politics, am absolutely convinced not only that the people are fully capable of governing themselves, but that they are decidedly the best judges as to those individuals to whom they shall delegate the truly representative power.

Individual selfishness, cupidity, and ambition are minimized in the party or general electorate selections of public servants; good general service is demanded by the electorate, special service by the individual.

Hence my advocacy of popular government. By popular government I mean direct legislation as far as practicable, popular selection of candidates, and such regulation of political campaigns as will secure fair and honest elections. Popular selection under the present stage of evolution of our government can be obtained only by direct primary laws and complete elimination of convention and caucus nomination of public officers.

Time was when a few self-constituted leaders in Oregon politics arrogated to themselves the prerogatives of government, and made their assumption effective through illicit combinations and the use of money in any and every quarter where necessary to their purposes of control, — that is, they commercialized conventions, legislatures, and the administrative branches of the city, county, and state government. It was not a

condition peculiar to Oregon. It obtained, and I believe still obtains, in a more or less flagrant degree, in every state in the Union; and it had its boldest, most unscrupulous executive genius in Boss Tweed, who, recognizing the opportunity of the crook in government by party through convention nominations, declared he did not care who elected the candidates so long as he had the power to nominate the ticket.

Revolting against these conditions, the state which I have the honor, in part, to represent, has evolved the best known system of popular government, and, because of this conviction, I take this opportunity of presenting not only to the Senate, but to the country, a brief analysis of the Oregon laws bearing upon this question, with my own deductions as to the improvement they show and the merits they possess.

Australian-Ballot Law

Oregon in 1891 adopted the Australian ballot, which insures secrecy, prevents intimidation, and reduces the opportunity for bribery. This, of course, is a prerequisite to any form of popular government.

Registration Law

Supplementing the Australian ballot law, Oregon enacted in 1899 a registration law applying to general elections, and enlarged its scope in 1904 in the law creating a direct primary. This law requires registration prior to voting in either the general or the primary election, and provides that before voting in a party primary the voter must, under oath, register his party affiliation. Registration begins five months prior to the general election. Registration books are closed ten days prior to the primary election and opened again four days after the primary, and then kept open until about twenty days before the general election. A voter may register either by appearing at the office of the county clerk or by signing registration blanks before a notary public or justice of the peace.

Upon the registration books are entered the full name of the voter, his registration number, date of registration, his occupation, age, nativity, date and place of naturalization, if any, and his place of residence. In order to guard against fraud it is required that the voter shall give his street and number, and, if he is not the head of the house he occupies, he must show that fact and give the number of the room he occupies and upon what floor of the building it is located. He must also sign the register, if he can write. If he is unable to write his name, the reason must be given. If his inability is due to a physical defect, the nature of the infirmity must be noted. If it is due to illiteracy, a physical description of the man must be noted in the register.

All these facts are entered in precinct registers, which are placed in the hands of election judges and clerks on election day, so that illegal voting may be prevented.

Any registered voter may be challenged and every nonregistered voter is considered challenged. An unregistered person qualified as an elector may be permitted to vote upon signing an affidavit setting forth all the facts required in registration, and also securing the affidavits of six owners of real property to the effect that they personally know him and his residence, and believe all his statements to be true.

Thus the greatest boon of American citizenship, namely the right to participate in government, is protected, and dead men, repeaters, and nonresidents can no longer be voted in Oregon.

Initiative and Referendum

Oregon's next step in popular government was the adoption of the initiative and referendum amendment to the constitution, which amendment was adopted in June, 1902, by a vote of 62,024 to 5668. It provides that legislative authority shall be vested in a legislative assembly, but that the people reserve to themselves the power to propose laws and amendments to the constitution, and to enact or reject the same at the polls independent of the legislative assembly, and also reserve power to approve or reject at the polls any act of the legislature. An initiative petition must be signed by 8 per cent of the legal voters, as shown by the vote for supreme judge at the last preceding general election, and filed with the Secretary of State not less than four months before the election.

A referendum petition need be signed by only 5 per cent of the voters and filed with the Secretary of State within ninety days after final adjournment of the legislature which passed the bill on which the referendum is demanded. The legislature may itself refer to the people any act passed by it. The veto power of the governor does not extend to any measure referred to the people.

State publishes Publicity Pamphlets

In addition to the publicity incident to the circulation of the petitions, the law provides that the Secretary of State shall, at the expense of the state, mail to every registered voter in the state a printed pamphlet containing a true copy of the title and text of each measure to be submitted to the people, and the proponents and opponents of the law have the right to insert in said pamphlet, at the actual cost to themselves of paper and printing only, such arguments as they see fit to make. These pamphlets must be mailed not later than fifty-five days before a general election and twenty days before a special election.

The initiative develops the electorate, placing directly upon them the responsibility for legislation enacted under its provision; the referendum elevates the legislature because of the possibility of its use in case of

undesirable legislation. Brains, ideas, and argument rather than money, intimidation, and logrolling govern the standards of legislation.

Corporation attorneys must exercise their mental activities along constructive rather than destructive and avoidance lines. Possibility of scandal is minimized, recipients of franchises freed from the imputation of secret purchase, and general community confidence is secured.

Oregon's Experience Satisfactory

Since that amendment was adopted the people of Oregon have voted upon twenty-three measures submitted to them under the initiative, five submitted under the referendum, and four referred to the people by the legislature. Nineteen measures were submitted at one election. That the people acted intelligently is evident from the fact that in no instance has there been general dissatisfaction with the result of the vote. The measures submitted presented almost every phase of legislation, and some of them were bills of considerable length.

Results attained under direct legislation in Oregon compare so favorably with the work of a legislative assembly that an effort to repeal the initiative and referendum would be overwhelmingly defeated. No effort has ever been attempted.

It has been asserted that the people will not study a large number of measures, but will vote in the affirmative, regardless of the merits of measures submitted. Experience in Oregon has disproved this, for the results show that the people have exercised discriminating judgment. They have enacted laws and have adopted constitutional amendments in which they believed and have defeated those of which they did not approve.

Concrete Illustrations

I will give several concrete illustrations.

Under the initiative in 1904 a local-option liquor law was adopted by a vote of 43,316 to 40,194. Two years later the opponents of the local-option law proposed an amendment in their interest, and this was defeated by a vote of 35,297 to 45,144. It will be noticed that in the first instance the issue was affirmatively presented and in the second instance negatively, with a view to befogging the people, but the popular expression was the same in both.

For many years city charters in Oregon had been made the trading stock of political factions in the legislature. The dominant faction amended city charters as a reward to political allies. Traffic in local legislation even went so far that it sometimes served as a consideration in election of United States senators. But in 1906, having tired of this disregard of the interest of good municipal government, the people, acting under the initiative, adopted a constitutional amendment which took

away from the legislature the power to enact or amend a city charter and vested that power in the people of the municipalities, thus establishing home rule. The amendment was adopted by a vote of 52,567 to 19,852.

In Oregon, as in many other states, there has long been a feeling that certain classes of corporations which own very little tangible property do not bear their proper share of the burden of taxation. Legislatures failed to provide a remedy. For the purpose of securing a more equitable distribution of the burden of taxation the state grange, proceeding under the initiative, proposed a law levying a gross-earnings tax of 3 per cent on sleeping-car, refrigerator-car, and oil-car companies, which measure was adopted by a vote of 69,635 to 6441. The grange also proposed a similar law levying a gross-earnings tax of 3 per cent on express and 2 per cent on telephone and telegraph companies, and it was adopted by a vote of 70,872 to 6360. Each of these gross-earnings tax laws applied only to intrastate business.

That the people can and will study measures and vote with discrimination is shown by the record upon two appropriation bills passed by the legislature of 1907. One of these bills proposed to increase the annual fixed appropriation for the state university from $47,500 to $125,000. The other bill appropriated $100,000 for construction of armories for the National Guard. The referendum was demanded upon both measures, and both were submitted to a vote of the people at the general election in 1908. There was full and fair discussion through the press, at public meetings, and at sessions of the grange. The bill increasing the appropriation for the university was approved by the people by a vote of 44,115 to 40,535. The armory appropriation bill was defeated by a vote of 33,507 to 54,848.

I shall cite but one more of many instances which show the manner in which the initiative has been effective in Oregon. For a great many years there had been efforts to secure adequate laws for the protection of salmon in the Columbia River, but because of conflicting interests between the upper river and the lower river, legislatures could not be induced to enact laws that would protect the fish. As a consequence the salmon fisheries were being destroyed. At the election in 1908 the upper-river fishermen proposed under the initiative a bill practically prohibiting fishing on the lower river and the lower-river fishermen proposed a bill forbidding fishing on the upper river. There was wide discussion of both bills, and the suggestion was freely made that both bills should be adopted. The people, disgusted with the failures of the legislatures to enact suitable laws for the protection of fish, followed this suggestion, and both bills were enacted. With fishing practically prohibited on both sections of the river, the legislature in 1909 responded to the popular demand by enacting, in conjunction with the legislature of the state of Washington, a fishery law which provided adequate protection. I believe

I am safe in saying that this would not have been done but for the popular adoption of the two fishery bills.

I do not care to take the time of the Senate to discuss each of the measures that have been acted upon by the people of the state, but in order that those who desire may have the opportunity to observe the wide range the measures have taken and the attitude assumed toward them by the people of Oregon, I ask consent to have published in the *Record* in this connection a very brief summary of the titles of the measures, together with the vote upon each.

POPULAR VOTE UPON MEASURES SUBMITTED TO THE PEOPLE OF OREGON UNDER EITHER THE INITIATIVE OR REFERENDUM

	Yes	No
1904		
Direct primary law with direct selection of United States senator[1]	56,205	16,354
Local-option liquor law[1]	43,316	40,198
1906		
Omnibus appropriation bill, state institutions[2]	43,918	26,758
Equal-suffrage constitutional amendment[1]	36,902	47,075
Local-option bill proposed by liquor people[1]	35,297	45,144
Bill for purchase by state of Barlow toll road[1]	31,525	44,527
Amendment requiring referendum on any act calling constitutional convention[1]	47,661	18,751
Amendment giving cities sole power to amend their charters[1]	52,567	19,852
Legislature authorized to fix pay of state printer[1]	63,749	9,571
Initiative and referendum to apply to all local, special, and municipal laws[1]	47,678	16,735
Bill prohibiting free passes on railroads[1]	57,281	16,779
Gross-earnings tax on sleeping-car, refrigerator-car, and oil-car companies[1]	69,635	6,441
Gross-earnings tax on express, telephone, and telegraph companies[1]	70,872	6,360
1908		
Amendment increasing pay of legislators from $120 to $400 per session[3]	19,691	68,892
Amendment permitting location of state institutions at places other than the capital[3]	41,971	40,868
Amendment reorganizing system of courts and increasing supreme judges from three to five[3]	30,243	50,591
Amendment changing general election from June to November[3]	65,728	18,590
Bill giving sheriffs control of county prisoners[2]	60,443	30,033
Railroads required to give public officials free passes[2]	28,856	59,406
Bill appropriating $100,000 for armories[2]	33,507	54,848

[1] Submitted under the initiative.
[2] Submitted under the referendum upon legislative act.
[3] Submitted to the people by the legislature.

	Yes	No
Bill increasing fixed appropriation for state university from $47,500 to $125,000 annually[1]	44,115	40,535
Equal-suffrage amendment[1]	36,858	58,670
Fishery bill proposed by fish-wheel operators[2]	46,582	40,720
Fishery bill proposed by gill-net operators[2]	56,130	30,280
Amendment giving cities control of liquor selling, poolrooms, theaters, etc., subject to local-option law[2]	39,442	52,346
Modified form of single-tax amendment[2]	32,066	60,871
Recall power on public officials[2]	58,381	31,002
Bill instructing legislators to vote for people's choice for United States senators[2]	69,668	21,162
Amendment authorizing proportional-representation law[2]	48,868	34,128
Corrupt-practices act governing elections[2]	54,042	31,301
Amendment requiring indictment to be by grand jury[2]	52,214	28,487
Bill creating Hood River County[2]	43,948	26,778

Direct Legislation not Expensive

Anticipating the objection that direct legislation is expensive to the state, I will say that the submission of a total of thirty-two measures at three different elections in Oregon has cost the state $25,000, or an average of about $781 for each measure. At the election in 1908 there were nineteen measures submitted, at a cost to the state of $12,362, or an average of about $651 each. Five of these nineteen measures were submitted without argument. Upon the other fourteen measures there were nineteen arguments submitted, for which the authors paid the cost, amounting to $3157.

I have no hesitancy in saying that the people of Oregon feel satisfied that they have received full value for the $25,000 they have spent for the submission of measures under the initiative and referendum. The only persons who raise the question of cost are those who would be opposed to direct legislation if it were free of cost. I think I could cite numerous instances of laws passed by the legislature which cost the people much more than $25,000 without any tangible return, and perhaps could cite a few measures which had been defeated by legislatures with resultant loss to the people of many times $25,000. The cost of legislation cannot always be measured in dollars.

People Intelligent and Fair

The people are not only intelligent, but fair and honest. When the initiative and referendum was under consideration it was freely predicted by enemies of popular government that the power would be abused and

[1] Submitted under the referendum upon legislative act.
[2] Submitted under the initiative.

that capitalists would not invest their money in a state where property would be subject to attacks of popular passion and temporary whims. Experience has exploded this argument. There has been no hasty or ill-advised legislation. The people act calmly and deliberately and with that spirit of fairness which always characterizes a body of men who earn their living and acquire their property by legitimate means. Corporations have not been held up and blackmailed by the people, as they often have been by legislators. "Pinch bills" are unknown. The people of Oregon were never before more prosperous and contented than they are to-day, and never before did the state offer such an inviting field for investment of capital. Not only are two transcontinental railroads building across the state, but several interurban electric lines are under construction, and rights of way for others are in demand.

I have mentioned all of these facts for the purpose of showing that the people of my state, and, I believe, the people of every other state, can be trusted to act intelligently and honestly upon any question of legislation submitted for their approval or disapproval.

The initiative and referendum is but one of the features of popular government in Oregon. It has been the means by which other reforms and progressive laws and constitutional amendments have been secured, for it has been found that the people cannot always get the laws they desire through the legislature, but can get them through resort to the initiative.

Direct-Primary Law

The next step after the adoption of the initiative and referendum was the adoption, in 1904, by a vote of 56,205 to 16,354, of a direct-primary law, which is designed to supersede the old and unsatisfactory convention system. The Oregon direct-primary law provides for a primary election to be held forty-five days prior to the general election at the usual polling places and with the usual three election judges and three clerks in charge, appointed by the county courts. Not more than two judges or clerks can be members of the same political party. Two sets of ballots are provided, one for the Democratic party and one for the Republican party. Any party polling 25 per cent of the vote at the previous election is brought under the provisions of the direct-primary law, but thus far only the Democratic and Republican parties are affected by it.

Any legal voter may become a candidate in the primaries for nomination for any office by filing a petition signed by a certain per cent of the voters of his party. If the nomination is for a municipal or county office, the petition must include registered electors residing in at least one fifth of the voting precincts of the county, municipality, or district. If it be a state or district office and the district comprises more than one county, the petition must include electors residing in each of at least one

eighth of the precincts in at least two counties in the district. If it be an office to be voted for in the state at large, the petition must include electors residing in each of at least one tenth of the precincts in each of at least seven counties of the state. If it be an office to be voted for in a congressional district, the petition must include electors residing in at least one tenth of the precincts in each of at least one fourth of the counties in the district. The number of signers required is at least 2 per cent of the party vote in the electoral district, but not more than one thousand signers are required for a state or congressional office nor more than five hundred in any other case. Petitions must be filed for a state or district office at least twenty days before the primary election, and for county or municipal offices fifteen days before the election. Names of the candidates are arranged on the ballots in alphabetical order. The ballot for the Republican party is printed on white paper, that for the Democratic party on blue paper, and that for any other party on yellow paper. The Australian-ballot form is used in the primaries. No elector is qualified to vote at a party-primary election unless he has registered and designated, under oath, his party affiliation, except that he may register at the polls on election day by filing an affidavit, verified by six freeholders of his precinct, certifying to his legal qualifications, in which affidavit he must also designate his party affiliation.

Party Integrity Protected

No voter is required to designate his party affiliation in order to vote at the general election, but registration of party affiliation is a prerequisite to participation in a party primary. This requirement prevents the participation of members of one party in the primaries of another party. The right of each party to choose its own candidates is thus protected, and an evil all too common where restrictive party-primary laws are not in force is avoided.

Our direct-primary law further provides that the candidate in his petition shall, among other things, agree to "accept the nomination and will not withdraw"; and, if elected, "will qualify as an officer," implying, of course, that he will also serve. Each candidate is entitled to have placed in his petition a statement in not to exceed one hundred words, and on the ballot, after his name, a legend in not to exceed twelve words, setting forth any measures or principles he especially advocates.

In the case of a legislator's nomination the candidate may, in addition to his statement, not exceeding one hundred words specifying measures and principles he advocates, also subscribe to one of two statements; but if he does not so subscribe, he shall not on that account be debarred from the ballot. It will be seen, therefore, that three courses are open to him. He may subscribe to Statement No. 1, as follows:

I further state to the people of Oregon, as well as to the people of my legislative district, that during my term of office I shall always vote for that candidate for United States senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a senator in Congress, without regard to my individual preference.

Or he may subscribe to Statement No. 2, as follows:

During my term of office I shall consider the vote of the people for United States senator in Congress as nothing more than a recommendation which I shall be at liberty to wholly disregard if the reason for doing so seems to me to be sufficient.

Or he may be perfectly silent on the election of United States senator. It is entirely optional with the candidate.

Popular Vote for United States Senator

The law further provides that the United States senators may be nominated by their respective parties in the party primaries, and the candidate receiving the greatest number of votes thereby becomes the party nominee. Then in the general election the party nominees are voted for by the people, and the individual receiving the greatest number of votes in the general election thereby becomes the people's choice for United States senator.

Notwithstanding that our primary-election law embodying these statements, particularly Statement No. 1, was passed by a popular vote of approximately 56,000 for to 16,000 against, the opponents of the law charged that the people did not know what they were doing when they voted for it. Therefore the advocates of the election of senators by the people and of the enforcement of Statement No. 1 submitted to the people under the initiative in 1908 the following bill:

Be it enacted by the people of the state of Oregon:

Section 1. That we, the people of the state of Oregon, hereby instruct our representatives and senators in our legislative assembly, as such officers, to vote for and elect the candidates for United States senators from this state who receive the highest number of votes at our general elections.

Although there was no organized campaign made for the adoption of this bill other than the argument accompanying its submission, while the opponents of the primary law assailed it vehemently, the basic principle of Statement No. 1 and the election of United States senators by the people was again indorsed by the passage of the bill by a popular vote of 69,668 for it to 21,162 against it, or by nearly $3\frac{1}{2}$ to 1.

How a Democrat was elected Senator

Mr. President, in this connection I deem it proper to divert for a time from an explanation of our primary law and give a concrete illustration of its operation. Both my colleague, Senator Chamberlain, and myself were selected by the people and elected by the legislature under the provision of this law. Opponents of popular government, and especially of the election of United States senators by a direct vote of the people, have bitterly assailed Statement No. 1 of our law because a legislature, overwhelmingly Republican, elected my colleague, who was a candidate selected by the Democratic party and nominated by the whole electorate of the state as the people's choice of our state for United States senator. Upon reflection I think every intelligent man who is honest with himself must concede that this fact, instead of being the basis of a criticism, is the highest kind of evidence as to the efficacy of the law, and every advocate of the election of United States senators by a popular vote must realize that Oregon has evolved a plan through its Statement No. 1, provision of its primary law, wherein, in effect, the people enjoy the privilege of selecting their United States senators, and, through the crystallization of public opinion, the legislative ratification of their action.

The Oregon legislature consists of ninety members, thirty in the Senate and sixty in the House, forty-six making the necessary majority on full attendance for the election of United States senator. Fifty-one members out of ninety of the legislature which elected my colleague, Senator Chamberlain, were subscribers to Statement No. 1, making on joint ballot a majority of six out of a total of ninety members. All of these fifty-one members subscribed to Statement No. 1 pledge voluntarily, and it was so subscribed to by them from a personal belief in the desirability of the popular election of United States senators, and for the purpose of securing for themselves, from the electorate, preferment in the election to the office sought; the consideration in exchange for such preferment was to be by them, as the legally constituted representatives of the electorate in their behalf, the perfunctory confirmation of the people's selection of United States senator as that choice might be ascertained under the provisions of the same law by which the legislators themselves secured nomination to office.

To further illuminate the situation, I will state that in the primaries held in April, 1908, H. M. Cake received the Republican nomination for United States senator, and my colleague, Senator Chamberlain, then governor of the state, received the Democratic nomination for United States senator. At the general election in June, Senator Chamberlain defeated Mr. Cake, notwithstanding the state was overwhelmingly Republican, thereby developing from the Democratic candidate into the people's choice for United States senator. The normal Republican majority in Oregon, I think, is from fifteen thousand to twenty thousand. With full

recognition of Governor Chamberlain's ability and fitness for the office, the fact that for nearly six years he made the best governor Oregon ever had, and considering that undoubtedly he is the most popular man in our state, I deem it but just to the law, and a proper answer to the criticism of enemies of the law that it destroys party lines and integrity, to state that, in my opinion, Senator Chamberlain received the votes of several thousand Republican enemies of the law, who believed that in selecting Governor Chamberlain, a Democrat, they would prevent a Republican legislature from ratifying the people's selection, obeying the people's instructions, and electing as United States senator the individual, regardless of party, that the people might select for that office. Thus they hoped to make the primary law and Statement No. 1 odious, and sought to create what they thought would be an impossible condition by forcing upon a Republican legislature for confirmation the popularly designated Democratic candidate for the United States Senate. They failed to realize that, greater than party and infinitely greater than any individual, the people's choice becomes a representative of the principle and of the law; that the intelligence and integrity of the whole electorate of the state, as well as the integrity and loyalty of the members of the legislature, were at stake; and from any honorable viewpoint the mere intimation of the possibility of the legislature or any member of the legislature failing conscientiously to fulfill his pledge or loyally obey the instructions of the people would not only be an insult to the individual members of the legislature, but an insult to the intelligence, independence, and patriotism of the Oregon electorate that they would permit such action to go unnoticed or without holding the culprit to a rigid responsibility for his treason.

No Oath more Sacred

Let us again consider the wording of this Statement No. 1 pledge, taken by fifty-one members of the Oregon legislature:

Statement No. 1

I further state to the people of Oregon, as well as to the people of my legislative district, that during my term of office I will always vote for that candidate for United States senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a senator in Congress, without regard to my individual preference.

No oath could be more sacred in honor, no contract more binding, no mutual consideration more definite, than is contained in this Statement No. 1 pledge, and no parties to a contract could be of more consequence to government and society than the electorate upon the one side and its servants upon the other.

Under the United States Constitution there can be no penalty attached to the law. The legislator breaking his sacred pledge cannot be imprisoned or fined; hence he is doubly bound by honor to redeem his voluntary obligations. Failure to do so would not only brand him as the destroyer of a sacred trust, but as the most contemptible of cowards, because legally immune from punishment for his perfidy.

Yet, Mr. President, there were efforts made to dishonor our state and our public servants. During the session of the legislature a former government official, an assistant to the chairman of the Republican National Committee, appeared in Oregon and, I am informed, promised federal appointments to legislative members if they would disregard their Statement No. 1 pledges to the electorate. The effort was made by the enemies of the law to create the impression that by reason of this person's relations with the chairman of the Republican National Committee during the national campaign, he would be able to deliver these promised federal appointments in case Statement No. 1 subscribers sold their honor and betrayed their trust.

I mention these facts to show that the greatest possible strain was placed upon our law, and to the credit of the fifty-one subscribers of Statement No. 1 in that legislature be it said that every one of those subscribers voted in accordance with his solemn obligation. But I would call the attention of the Senate to the fact that, notwithstanding the people of the state had passed under the initiative the bill I have referred to, instructing all the members of the legislature to vote for the people's choice for United States senator, not a single member of the legislature obeyed said instructions except the Statement No. 1 subscribers.

An Evolution of Practical Politics

Mr. President, Statement No. 1 was an evolution of many years' experience with practical and commercial politics. We doubtless all have found in individual cases that men's memories, pledges, and agreements were a negligible quantity, but I think we in Oregon have demonstrated that our direct-primary law contains a pledge that will hold any sane man, regardless of his cupidity, ambition, cowardice, or temerity.

Other Provisions of Primary Law

Resuming consideration of the direct primary: The returns from a primary election are canvassed in the same manner as the returns from a general election, and the candidate receiving the highest vote for each office is declared the nominee of his party. Candidates of parties other than those polling 25 per cent of the total vote of the state may be nominated without participating in the direct primary, but by means of petition or mass meeting. No candidate nominated otherwise than in

the direct primary can use either the word "Republican" or "Democrat" in any form; that is, the nominees of the direct primary are entitled to the party designation in the general election, and no opposition candidate can designate himself as an "Independent Republican" or "Progressive Republican," or use any other qualifying term which includes the word "Republican" or "Democrat." These provisions secure to the nominees of the direct primary the exclusive right to their party designation on the ballot in the general election. Each candidate in the direct primary is entitled to have placed in his petition for nomination a statement containing not to exceed one hundred words, and on the ballot in the primary and general election a legend of not more than twelve words, specifying any measures or principles he especially advocates.

In my opinion the direct primary is the only practicable method of fully securing to the people their right to choose their public servants.

Convention Nominee under Obligation to a Boss

Under the convention system the members of a party delegate their power of selection of candidates to the members of a convention. To my mind this system is most pernicious, because the party electorate feels that its responsibility ceases with the selection of its convention delegates. Hence the responsibility of citizenship is weakened and shiftlessness encouraged.

As soon as the delegates to the convention are chosen the power of selection of public servants becomes centralized in a few and opportunity is extended to individuals and interests who wish to use public servants for selfish or ulterior purposes. Influences adverse to the general welfare are immediately brought to bear upon this body of delegates. Factions are created, combinations effected, and party disruption frequently results. Often a convention nominates a man for public office who, prior to the convention, was never seriously considered as a probable nominee.

In my thirty years' experience in politics quite frequently have I seen this the case. This strengthens my conviction that the prevailing system of convention selections of party candidates is not representative, but misrepresentative, form of government. The people certainly have no voice in the selection of candidates when their temporary representatives had no idea of making a selection until occurrences transpiring during the convention determined their action.

Let us look at the system in vogue in the selection of delegates. In most cases where convention nominations are made we can trace back to the political boss and machine the preparation of a slate of delegates. In the selection of the individuals composing the slate the political boss has in mind the perpetuation of his own power, and selects individuals whose interests are identical with his or whom he thinks he can direct and control, though occasionally, if anticipating a struggle, he will select

a few men whose standing in the community will bring strength to the slate he has prepared in order to carry out his purposes. Independent men are selected only where it is deemed necessary by the political boss to deceive the public and secure sufficient support from the personal influence of those few selections to carry through the slate made up chiefly of his willing tools. This system prevails not only in selection of delegates to county conventions, but in selection of delegates to congressional, state, and national conventions as well. The result is inevitable that the delegates nominate candidates whom the machine and political bosses desire, except in rare cases where a few independent men are able, by presentation of arguments against the qualifications of a machine candidate, to demonstrate to the convention the probability of the defeat of the man slated for the position. Frequently, of course, a case is presented where the boss has made promises to various aspirants for the same office, in which case he excuses himself to the disappointed aspirant by explaining that he was unable to control the convention. Thus mendacity and treachery are fostered by the convention system, which, by the primary system, are absolutely eliminated.

Under the convention system the nominee realizes that his nomination is due chiefly, if not entirely, to the boss. With this knowledge naturally goes a feeling of obligation, so that the nominee, when elected, is desirous, whenever possible, of acceding to the wishes of the man to whom his nomination is due. Thus the efficiency and independence of the public servant is seriously affected and his duty to the public in many cases completely annihilated.

Nominee of Direct Primary Responsible to People Alone

How different in its operation is the direct primary. The man who seeks a nomination under the direct-primary system must present before the members of his party the policies and principles by which he will be governed if nominated and elected. He must submit to them his past record in public and private life. Promises made to political bosses or machine managers will have no beneficial influence in determining the result, and therefore the candidate is not tempted to place himself under obligations to any interests adverse to those of the general public. The members of a party have it within their power to determine which of the candidates best represents their ideas and wishes. After they have made their selections the candidates of opposing parties must stand before the people at the general election, when a choice will be made between them. A public servant thus chosen owes his election to no faction, machine, or boss, but to the members of his party and the electorate of his state or district. He is accountable to them alone for his conduct in office, and has therefore every incentive to render the best possible public service. How different in all essentials from the position of the

candidate who has received his nomination at the hands of a convention controlled by a political machine.

The great masses of the people are not only intelligent, but honest. They have no selfish interests to serve and ask nothing of their public officials but faithful and efficient service. Only the very few have interests adverse to those of the general welfare. The people therefore act only for public good when they choose between candidates for the nomination or candidates for election.

The direct primary encourages the people of the country to study public questions and to observe and pass judgment upon the acts of their public officials. This in itself tends very strongly to the building up of a better citizenship.

Honest selections mean honest government and better public servants.

Public servants who lack confidence in the intelligence or honesty of the people will find their feelings reciprocated.

Primary Laws protect Parties

Many claim that primary laws destroy party. In my opinion they protect and cement parties. Party success depends, under primary laws, upon the ideas and principles advocated and the nominations made by the parties in their primaries. If a majority party fails to make proper nominations, or if the minority party has better material in its electorate, then a minority party would rapidly develop into a majority party and rightly so. Under a direct-primary law no individual can acquire a large personal following or build up a personal organization, except such a following as would support the individual on account of the principles advocated by him or the demonstration made by him as a public servant. But no man would be able to transfer such a following for or against another individual, though he might influence thousands or hundreds of thousands of voters to support his ideas, constructive suggestions, or proposed solution of pending problems. This does not destroy party, but elevates and strengthens it, and fortunate indeed is that party which possesses in its electorate one or more individuals who are able to advance new ideas or evolve solutions which appeal to the sound judgment of his fellow men.

Popular Selection of President and Vice President

For years the desirability of popular selection of candidates for President and Vice President has grown upon my mind. By adoption of such a plan presidents would be relieved of prenomination or preëlection obligations, except the obligation of good service to all the people. Thus accountability to the people alone would be established and aspirants for the presidency would be free from the necessity of consulting the wishes

of men who make and manipulate conventions. To render good public service would be the sole desire, for reëlection would depend upon demonstration of capability and fitness for office. Because of this conviction I have arranged to submit, under the initiative, to the people of Oregon at the next general election a bill further enlarging the scope of our present primary law. It provides for the direct-primary election of delegates to national conventions, selections of presidential electors, and gives the opportunity to the elector in his party primary to express his preference for President and Vice President.

I am confident that the people of Oregon will enact this law, and I hope that other states will follow her example, in which event, through the crystallization of public opinion, a method of popular selection of presidents and vice presidents would be secured without violation of the federal Constitution.

Not a Revolutionary Change

The declaration by each state of its choice for President would be in no sense a wider departure from the Constitution than was the transformation of the electoral college into a mere registering or recording board, yet no one now thinks such change in any wise revolutionary. The theory of the Constitution was that each state should choose a body of electors who should have choice — election — as to those for whom they should vote for President and Vice President. This theory we find expressed in all the expository letters and pamphlets written by those who drafted the Constitution. The electors were to be free men, bound to no candidate nor to any party. They were to meet and survey the whole country, choosing therefrom, according to their own unhampered and wisest judgment, the man best fitted to be the head of the nation. This was the law in 1789, and it is the law to-day. Theoretically and legally the electoral college which casts its perfunctory vote for Mr. Taft and Mr. Sherman might have elected Mr. Bryan and Mr. Kerns. Had this been done, all the vast power of the Supreme Court could not have set the election aside or compelled a true registration of the popular decision as expressed at the polls. The Constitution of the United States was changed a hundred years ago by force of mere popular acceptation and general usage, so that its machinery to-day is used to effect an end which it does not in its letter express, and did not in its conception anticipate. We have made the constitutional machinery suit our idea of the way this government should be conducted.

We have said that it was better that we should, by means of political parties, choose candidates and by moral force bind the electors whom we nominate to vote for such candidates, than that we should leave the electors we might choose free to do as they saw fit. We have converted the elector into an agent — a messenger if you will — whose honorable

duty it is to cast a ballot for one who may not be his personal choice for President, or whom, indeed, he may regard as unfitted for the position of President. The constitutional theory has been abandoned and one more democratic has been substituted. We evolved a presidential-election plan which, while departing from the philosophy of the makers of our national organic law, preserved its letter and made it subserve the purpose of a society more highly developed than that existent when the law was made. This is the history of all written law. There is nothing startling in the proposal that the Constitution or any other law shall be so interpreted as to meet modern needs and thought. We moved toward democracy when we abolished the elector as an elector and left him but a figurehead, and it will be a much less radical move to give instructions by popular vote to the delegate who names the party candidate. Indeed, it would appear that to follow the latter course would be to do no more than institute a procedure complementary to the former.

Corrupt-Practices Act

The next step in popular government in Oregon after the adoption of the direct-primary law was the adoption of a corrupt-practices act, which the legislature had refused to enact, but which the people of the state adopted under the initiative.

The corrupt-practices act was adopted under the initiative in 1908 by popular vote of 54,042 to 31,301. It provides that no candidate for office shall expend in his campaign for nomination more than 15 per cent of one year's compensation of the office for which he is a candidate, provided that no candidate shall be restricted to less than $100.

Publicity Pamphlet

The act provides, however, for the publication of a pamphlet by the Secretary of State for the information of voters, in which pamphlet a candidate in the primary campaign may have published a statement setting forth his qualifications, the principles and policies he advocates and favors, or any other matter he may wish to submit in support of his candidacy. Each candidate must pay for at least one page, the amount to be paid varying from $100 for the highest office to $10 for the minor offices. Every candidate may secure the use of additional pages at $100 per page, not exceeding three additional pages. Any person may use space in this pamphlet in opposition to any candidate, the matter submitted by him being first served upon the candidate and the space being paid for the same as in the case of candidates. The matter submitted in opposition to candidates must be signed by the author, who is subject to the general laws regarding slander and libel. Information regarding state and congressional candidates is printed in a pamphlet issued by the Secretary

of State, one copy being mailed to each registered voter in the state. Pamphlets regarding county candidates are issued by the county clerk and mailed to each voter in the county. These pamphlets must be mailed at least eight days before the primary election. The amount of money paid for space in the public pamphlet of information is not considered in determining the amount each candidate has expended in his campaign; that is, he is entitled to expend in his primary campaign 15 per cent of one year's compensation in addition to what he pays for space in the public pamphlet.

Prior to the general election the executive committee or managing officers of any political party or organization may file with the Secretary of State portrait cuts of its candidates and typewritten statements and arguments for the success of its principles and the election of its candidates, and opposing or attacking the principles and candidates of all other parties. This same privilege applies to independent candidates. These statements and arguments are printed in a pamphlet and mailed to the registered voters of the state not later than the tenth day before the general election.

Each party is limited to twenty-four pages, and each independent candidate to two pages, each page in this pamphlet being charged for at the rate of $50 per page. In the campaign preceding the general election each candidate is limited in campaign expenditures to 10 per cent of one year's compensation.

For the purposes of this act the contribution, expenditure, or liability of a descendant, ascendant, brother, sister, uncle, aunt, nephew, niece, wife, partner, employer, employee, or fellow official or fellow employee of a corporation is deemed to be that of the candidate himself. Any person not a candidate spending more than $50 in a campaign must file an itemized account of his expenditures in the office of the Secretary of State or the county clerk, and give a copy of the account to the candidate for whom or against whom the money was spent.

Legitimate Use of Money within Limit

While the corrupt-practices act limits the candidate to the expenditure of 15 per cent of one year's salary in his primary campaign and 10 per cent of a year's salary in the general campaign, in addition to what he pays for space in the publicity pamphlet, yet the law does not prohibit any legitimate use of money within this limitation. The act makes it possible for a man of moderate means to be a candidate upon an equality with a man of wealth.

Let us take a concrete example as a means of illustrating the operation of Oregon's corrupt-practices act. The salary of the governor is $5000 a year. A candidate for the nomination for governor may take a maximum of four pages in the publicity pamphlet, and thus, at a cost

of $400, be able to reach every registered voter of his party in the entire state. In addition to that $400 he may spend $750, or 15 per cent of one year's salary, in any other manner he may choose, not in violation of the corrupt-practices act. A candidate may purchase space in the advertising columns of a newspaper, but in order that this paid advertising shall not be mistaken for news, the law requires that all paid articles be marked as such.

The law expressly provides that none of its provisions shall be construed as relating to the rendering of services by speakers, writers, publishers, or others for which no compensation is asked or given; nor to prohibit expenditure by committees of political parties or organizations for public speakers, music, halls, lights, literature, advertising, office rent, printing, postage, clerk hire, challengers or watchers at the polls, traveling expenses, telegraphing or telephoning, or the making of poll lists.

The successful nominee in the primary may spend in his general campaign 10 per cent of one year's salary, this expenditure, in the case of a candidate for governor, being $500. In addition to this 10 per cent of a year's salary he may contribute toward the payment for his party's statement in the publicity pamphlet to be mailed by the Secretary of State to every registered voter. In the publicity pamphlet for the general campaign each party may use not to exceed twenty-four pages, at $50 per page, making the total cost to the party committee $1200, or about $100 for each candidate.

The candidate is therefore limited to an expenditure of $600 in his general campaign, only $100 of which is necessary in order to enable him to reach every registered voter. He could reach every registered voter in his party in the primary campaign for $400. Under no other system could a candidate reach all the voters in two campaigns at a total cost of $500.

Improper Acts Prohibited

The Oregon corrupt-practices act encourages and aids publicity, but prohibits the excessive or improper use of money or other agencies for the subversion of clean elections. Among the acts which are prohibited I may mention these:

Promises of appointments in return for political support.

Solicitation or acceptance of campaign contributions from or payment of contributions by persons holding appointive positions.

Publication or distribution of anonymous letters or circulars regarding candidates or measures before the people.

Sale of editorial support or the publication of paid political advertising without marking it "paid advertising."

Use of carriages in conveying voters to the polls.

Active electioneering or soliciting votes on election day.

Campaign contributions by quasi-public or certain other important classes of corporations generally affected by legislation.

Intimidation or coercion of voters in any manner.

Soliciting candidates to subscribe to religious, charitable, public, and semipublic enterprises; but this does not prohibit regular payments to any organization of which the candidate has been a member, or to which he has been a contributor for more than six months before his candidacy.

Contribution of funds in the name of any other than the person furnishing the money.

Treating by candidates as a means of winning favor.

Payment or promise to reward another for the purpose of inducing him to become or refrain from becoming or cease being a candidate, or solicitation of such consideration.

Betting on an election by a candidate, or betting on an election by any other person, with intent to influence the result.

Attempting to vote in the name of another person, living, dead, or fictitious.

Publicity of Campaign Expenditures

There is no interference with such legitimate acts as tend to secure full publicity and free expression of opinion. Personal and political liberty is in no way infringed upon, the only purpose being to prohibit the excessive use of money, promises of appointment, or deception and fraud.

The corrupt-practices act requires that every candidate shall file an itemized statement of his campaign expenditures within fifteen days after the primary election, including in such statement not only all amounts expended, but all debts incurred or unfulfilled promises made.

Every political committee must have a treasurer, and cause him to keep a detailed account of its receipts, payments, and liabilities. Any committee or agent or representative of a candidate must file an itemized statement of receipts and expenditures within ten days after the election. The books of account of any treasurer of any political party, committee, or organization during an election campaign shall be open at all reasonable office hours to the inspection of the treasurer and chairman of any opposing political party or organization for the same electoral district. Failure to file statements as required by law is punishable by fine.

The candidate violating any section of the corrupt-practices act forfeits his right to the office. Any other person violating any section of this act is punished by imprisonment of not more than one year in the county jail or a fine of not more than $5000, or both. The candidate is also subject to the same penalties.

The Recall

The final step in the establishment of popular government in Oregon was the adoption of the recall amendment to the constitution, which was adopted in 1908 by a vote of 58,381 to 31,002. Under this amendment any public officer may be recalled by the filing of a petition signed by

25 per cent of the number of electors who voted in his district in the preceding election. The petition must set forth the reasons for the recall, and if the officer does not resign within five days after the petition is filed, a special election must be ordered to be held within twenty days to determine whether the people will recall such officer. On the ballot at such election the reasons for demanding the recall of said officer may be set forth in not more than two hundred words. His justification of his course in office may be set forth in a like number of words. He retains his office until the results of the special election have been officially declared.

No petition can be circulated against any officer until he has held office six months, except that in the case of a member of the state legislature it may be filed at any time after five days from the beginning of the first session after his election. At the special election the candidate receiving the highest number of votes is declared elected. The special election is held at public expense, but a second recall petition cannot be filed against an officer unless the petitioners first pay the entire expense of the first recall election.

The Best System of Popular Government

Mr. President, I reiterate that Oregon has evolved the best system of popular government that exists in the world to-day.

The Australian ballot assures the honesty of elections.

The registration law guards the integrity of the privilege of American citizenship, — participation in government.

The direct primary absolutely insures popular selection of all candidates and establishes the responsibility of the public servant to the electorate and not to any political boss or special interest.

The initiative and referendum is the keystone of the arch of popular government, for by means of this the people may accomplish such other reforms as they desire. The initiative develops the electorate because it encourages study of principles and policies of government, and affords the originator of new ideas in government an opportunity to secure popular judgment upon his measures if 8 per cent of the voters of his state deem the same worthy of submission to popular vote. The referendum prevents misuse of the power temporarily centralized in the legislature.

The corrupt-practices act is necessary as a complement to the initiative and referendum and the direct primary, for without the corrupt-practices act these other features of popular government could be abused. As I have fully explained, the publicity pamphlet provided for by the corrupt-practices act affords all candidates for nomination or election equal means of presenting before the voter their views upon public questions, and protects the honest candidate against the misuse of money in political campaigns. Under the operation of this law popular verdicts will be based upon ideas, not money; argument, not abuse; principles, not boss or machine dictation.

The recall, to my mind, is rather an admonitory or precautionary measure, the existence of which will prevent the necessity for its use. At rare intervals there may be occasion for exercise of the recall against municipal or county officers, but I believe the fact of its existence will prevent need for its use against the higher officials. It is, however, an essential feature of a complete system of popular government.

Absolute Government by the People

Under the machine and political-boss system the confidence of sincere partisans is often betrayed by recreant leaders in political contests and by public servants who recognize the irresponsible machine instead of the electorate as the source of power to which they are responsible. If the enforcement of the Oregon laws will right these wrongs, then they were conceived in wisdom and born in justice to the people, in justice to the public servant, and in justice to the partisan.

Plainly stated, the aim and purpose of the laws is to destroy the irresponsible political machine and to put all elective offices in the state in direct touch with the people as the real source of authority; in short, to give direct and full force to the ballot of every individual elector in Oregon and to eliminate dominance of corporate and corrupt influences in the administration of public affairs. The Oregon laws mark the course that must be pursued before the wrongful use of corporate power can be dethroned, the people restored to power, and lasting reform secured. They insure absolute government by the people.

THE INITIATIVE, THE REFERENDUM, AND THE RECALL[1]

By Margaret A. Schaffner

To make representative government more representative is the problem of to-day. The gradual process of social evolution has changed the industrial basis upon which our political institutions rest, and the increased complexity of our social organization has made the expression of the popular will more difficult. As readjustment to changing conditions is the requisite for any advancing type of life, so political progress becomes impossible unless new agencies are developed, to be retained or discarded as experience may warrant.

Among the agencies for political expression few have made more remarkable progress in the history of recent legislation than the initiative, the referendum, and the recall. State-wide referendums for the adoption of state constitutional, and local referendums for local affairs, are familiar institutions in the United States, but it is only within recent years that our states have begun to adopt the initiative and the referendum for state legislation.

[1] From *American Political Science Review*, 1907–1908.

Constitutional Amendments for the Initiative and the Referendum

Prior to 1907 a group of states, including South Dakota (1898), Utah (1900), Oregon (1902), Nevada (1904), and Montana (1906), had adopted constitutional provisions.[1] Some of these amendments were imperfectly drawn, and lack of experience as to the practical workings of direct legislation in certain cases led to the omission of essential provisions for securing the results which the amendments contemplated. The amendment for Utah was not made self-executing, and three successive legislatures have refused to provide for its operation. The amendment for Nevada provides only for the referendum, and the details of the plan are so imperfectly drawn that substantial results from the law are as yet "the substance of things hoped for" rather than the evidence of things seen. Among the earlier amendments the South Dakota provision adopted in 1898, and fortified by effective legislation in the following year, has undoubtedly served as the best model for subsequent attempts to secure direct legislation in this country. This amendment is quite closely modeled after the plan so long in successful operation in Switzerland, and although an undue use of the emergency clause has somewhat weakened the efficiency of the system in South Dakota,[2] that state has secured fairly satisfactory results from the operation of her law. The lack of provision for bringing initiative measures before the legislature and for securing competing bills has been one of the serious defects of the Oregon law. Oregon voters have too often been placed at the disadvantage of choosing between the acts of groups of extremists, instead of having a choice of measures resulting from the deliberative attempts of men to find some common basis for legislative action. Prior to the legislation of 1907 the Oregon system also suffered from the lack of publicity for proposed measures. This defect is largely overcome by the new law (1907, Chapter 226), which makes elaborate provision for the publication and distribution of initiative bills and of arguments to be submitted to the voters. However, the lack of opportunity for bringing proposed measures before the legislature, and the impossibility of securing the submission of competing bills, lessens the guarantee for careful consideration of proposed legislation and diminishes the voter's opportunity for discrimination and choice. The Montana amendment of 1906 introduced an innovation by requiring that two fifths of the whole number of counties of the state must each furnish the required per cent of signers for the initiative and referendum petitions. This provision will probably make it more difficult to secure the required number of signatures, and

[1] South Dakota Constitution (amended 1898), Article 3, Section 1. Utah, Constitution (amended 1900), Article 6, Sections 1 and 22. Oregon, Constitution (amended 1902), Article 4, Section 1. Nevada, Constitution (amended 1904), Article 19, Sections 1 and 2. Montana, Constitution (amended 1906), Article 5, Section 1.

[2] See State ex rel. Lavin, et al. *vs.* Bacon, et al. 1901, 14 S. D. 394.

the practical outcome of the plan will be awaited with interest by both advocates and opponents of direct legislation.

Although the amendments secured prior to 1907 show many defects, they have pointed the way for securing direct legislation in state affairs, and the experience gained through the practical application of the several laws is being utilized to establish more effective systems.

During the legislative sessions of 1907 the campaign for the initiative and referendum was carried on with unabated fervor. Measures providing for some form of direct legislation were introduced in some twenty states, and the results secured during the legislative year have made the question one of political importance throughout the country. The legislatures of Maine, Missouri, and North Dakota provided for the submission of constitutional amendments. The amendments for Maine and Missouri will be voted upon in 1908, while in North Dakota the proposed amendment must also be passed by the next legislature before being submitted to the people. The provisions[1] for the initiative and referendum in the constitution recently adopted by the people of Oklahoma are of special interest. This constitution is the first in our country to embody the principles of direct state legislation in the original draft, all of our other constitutional provisions on this subject having been secured through amendment.

Briefly outlined, the Oklahoma constitution contains the following provisions for direct state legislation: The initiative and the referendum apply both to constitutional and to statutory law. Legislative measures may be proposed by 8 per cent, and amendments to the constitution by 15 per cent of the legal voters. The total number of votes cast at the last general election for the state office receiving the highest number of votes is made the basis on which the required number of signatures is to be counted. A referendum may be ordered by 5 per cent of the legal voters, but laws necessary for the immediate preservation of the public peace, health, or safety are exempt from the referendum provisions. Referendum petitions are to be filed with the Secretary of State not more than ninety days after the final adjournment of the legislature which passed the bill on which a referendum is demanded. All elections on measures referred to the people are to be had at the next general election held throughout the state, except when the legislature or the governor shall order a special election for the express purpose of making such reference. Initiative measures require a majority of the votes cast at the election, while only a majority of the votes cast on a referred measure are necessary to give it effect. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislature. The veto power of the governor does not extend to measures voted on by the people. Any measure rejected by the people through

[1] Oklahoma, Constitution, 1907, Article 5, Sections 1–8; Article 18, Sections 4a–5b; and Article 24, Section 3.

the powers of the initiative and referendum cannot again be proposed by initiative within three years thereafter by less than 25 per cent of the legal voters.

The proposed amendment for North Dakota is modeled more closely after the Swiss law, and has many points of advantage over the provisions in the Oklahoma constitution, which follows the Oregon amendment in a number of particulars. The North Dakota provision for bringing the initiative measures before the legislature and for securing the submission of competing bills is an especially strong feature. Under the North Dakota plan 8 per cent of the legal voters may propose a measure by initiative petition. Every such petition must include the full text of the measure proposed, and must be filed with the Secretary of State not less than thirty days before any regular legislative session, and he is required to transmit the same to the legislature as soon as it convenes. Initiative measures take precedence over all measures in the legislative assembly except appropriation bills, and are either to be enacted or rejected without change or amendment within forty days. Any initiative measure enacted by the legislature is subject to referendum petition, or it may be referred by the legislature to the people for approval or rejection. If it is rejected, or no action is taken upon it by the legislature within forty days, the Secretary of State is to submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure proposed by initiative petition, and propose a different one to accomplish the same purpose, and in any such event both measures are to be submitted by the Secretary of State to the people for approval or rejection at the next election. If conflicting measures submitted to the people at the same election are approved by a majority of the votes severally cast for and against the same, the one receiving the highest number of affirmative votes becomes valid and the other is thereby rejected.

The North Dakota plan also makes provision against an undue use of the emergency clause by the legislature. When it is necessary for the immediate preservation of the public peace, health, or safety that a law shall become effective without delay, such necessity and the facts creating the same must be stated in one section of the bill. If, upon aye-and-no vote in each House, two thirds of all the members elected to each House vote on a separate roll call in favor of the law going into instant operation, it becomes operative upon approval of the governor. The referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety) as to any measure, or any parts, items, or sections of any measure, passed by the legislature, either by a petition signed by 5 per cent of the legal voters, or by the legislature by a majority vote. The filing of referendum petition against one or more items, sections, or parts of an act is not to delay the remainder of that act from becoming operative. Referendum petitions

against measures passed by the legislature are to be filed with the Secretary of State not more than ninety days after the final adjournment of the legislative session. The veto power of the government does not extend to measures referred to the people. All elections on measures referred to the people of the state are to be had at biennial regular general elections except as provision may be made by law for a special election or elections. Any measure referred to the people is to take effect when it is approved by a majority of the votes cast thereon, and is to be in force from the date of the official declaration of the vote. The whole number of votes cast for justices of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum is made the basis on which the number of legal voters necessary to sign such petition is to be counted. The amendment is self-executing, but legislation may be enacted especially to facilitate its operation.

The amendment[1] submitted in Maine is similar in its most important points to that of South Dakota. Provision is made against an undue use of the emergency clause, and also for securing the submission of competing bills from the legislature. A peculiarity of the Maine law is that it provides for a definite number instead of a percentage of signatures to propose or refer measures; thus it requires 12,000 signatures for initiative and 10,000 for referendum petitions. This is probably due to the fact that the legislature of Maine considered the population of the state a fairly fixed element. The amendment applies to statutory law, but it does not provide for changes in the constitution through initiative petitions.

The proposed amendment[2] for Missouri provides that laws and amendments to the constitution may be proposed by 8 per cent and the referendum may be invoked by 5 per cent of the legal voters. There is also a provision that the number of signatures required for initiative and referendum petitions must be secured in each of at least two thirds of the congressional districts in the state. The amendment does not apply to laws necessary for the immediate preservation of the public peace, health, or safety, nor to laws making appropriations for the current expenses of the state government, for the maintenance of the state institutions, and for the support of the public schools. The lack of provision for bringing proposed measures before the legislature and for securing the submission of competing bills must be considered a weak point in the Missouri plan.

The Advisory Initiative and Advisory Referendum for State Measures

The difficulty of securing constitutional amendments for the initiative and the referendum have led to the development of other methods for securing at least partial systems of direct state legislation.

[1] Maine, Resolves, 1907, Chapter 121. [2] Missouri, Laws, 1907, pp. 452–453.

The Illinois public-opinion system (Laws, 1901, p. 198), adopted in 1901, provides for an expression of opinion by electors on questions of public policy at any general or special election. Under this law the submission of any question for an expression of public opinion may be secured on a written petition signed by 25 per cent of the registered voters of any incorporated town, village, city, township, county, or school district, or by 10 per cent of the registered voters of the state. The petition must be filed with the proper election officers, in each case, not less than sixty days before the date of the election at which the question is to be considered, and not more than three propositions may be submitted at the same election. This law is a step toward the advisory initiative, but it does not go quite so far, as the voter merely expresses an opinion instead of being able to instruct his representatives by direct ballot. The public-opinion system has been used in Illinois on a number of state questions, but as the candidates for the legislature were not pledged to obey the wishes of their constituents, these expressions of public opinion have not been very effective in securing the legislation desired.

A vigorous campaign for the advisory initiative and the advisory referendum was conducted in a number of states during the past legislative year. The question excited special interest in Massachusetts, where a pledged majority of the legislature for the advisory initiative broke their pledges by refusing to pass the proposed bill. Other states had similar experiences with representatives pledged to vote for the advisory system of direct legislation, although the plan continues to receive the approval of public men of all parties. In his last message to the Minnesota legislature Governor Johnson called attention to the merits of this system and declared himself to be "firmly of the opinion that such legislation is desirable."

The Texas system (Laws, 1905, Chapter 11, Section 140) provides for the advisory initiative within the parties at primary elections. The law applies "whenever delegates are to be selected by any political party to any state or county convention, or candidates are instructed for, or nominated." Under this law 10 per cent of the voters in any political party may propose policies and candidates and secure a direct party vote thereon. Petitions are to be filed with the chairman of the county or the precinct executive committee at least five days before the tickets are to be printed, and the chairman may require a sworn statement that the names of the applicants are genuine. The number of signatures necessary for a petition is to be determined by the votes cast for the party nominee for governor at the preceding election. It is made the duty of the chairman to submit any proposition for which a petition is filed, and the delegates selected at that time are to be considered instructed for whichever proposition a majority of the votes are cast. Provision is also made that all additional expenses of printing any proposition on the official primary ballot is to be paid for by the parties requesting the same.

Advocates of direct legislation have recently been carrying on a campaign for the advisory initiative and advisory referendum for national affairs. One hundred and ten members of the present House of Representatives are pledged to vote for the establishment of the advisory referendum for acts of Congress or bills passed by either House, and for the establishment of the advisory initiative for the following topics: civil service; immigration; interstate commerce, including parcels post; trial by jury or any modification of the law of injunction; the eight-hour day in government-contract work; the initiative and referendum; the election of United States senators by the people; and proportional representation.

The Recall

The recall is another political institution, developed in Switzerland, which is being established in this country in an increasing number of municipalities. At the present time it is in existence in a large number of cities[1] in California and in Washington. It is also to be found in certain cities in Idaho, Iowa, Michigan, and Texas. The validity of the recall has been sustained in a number of court decisions.[2] Recently the California state appellate court of the second district held that the act of the city council in accepting the petition for the recall of a councilman was merely ministerial, and that when a petition bears the proper number of names of electors, as shown by the clerk's certificate, no discretion remains with the council, but it is its duty to call an election.[3]

A typical example of the recall for city officials is found in the new law (1907, Chapter 48) of Iowa, which provides for the adoption of the commission system of government by cities having a population of 25,000 or over. Section 18 provides that the holder of any elective office may be removed at any time by the electors qualified to vote for a successor

[1] Among the California cities which have secured the recall as a charter right are Los Angeles (Cal. Laws, 1903, Chapter 6); San Diego (Cal. Laws, 1905, Chapter 11); San Bernardino (Cal. Laws, 1905, Chapter 15); Pasadena (Cal. Laws, 1905, Chapter 20); Fresno (Cal. Laws, 1905, Chapter 23); Santa Monica (Cal. Laws, 1907, Chapter 6); Alameda (Cal. Laws, 1907, Chapter 7); Long Beach (Cal. Laws, 1907, Chapter 15); Riverside (Cal. Laws, 1907, Chapter 25).

In Washington, Seattle secured the recall in 1906, and in 1907 the Spokane city council adopted an ordinance for the recall to be submitted to the people as a proposed amendment to the charter. Under Chapter 241, Laws, 1907, provision is made for the recall in all cities of the second class. This includes cities having a population between 1500 and 10,000.

For Idaho, see Lewiston charter (Laws, 1907, p. 349).

Des Moines adopted the recall under the Iowa Law (1907, Chapter 48) providing for the commission system of government.

In April, 1906, Grand Rapids, Mich., adopted the recall under the provisions of her new charter (Mich. Laws, 1905, No. 593), establishing the initiative and referendum for charter amendments.

[2] Davenport *vs.* City of Los Angeles, et al. 1905, 146 Cal. 508; Good *vs.* Common Council of City of San Diego, 1907, Chapter 90, p. 44 (Cal. App.).

Also compare Rex *vs.* Richardson, 1758, 1 Burr, 517, in which it was held that "the power to remove a corporate officer from his office for reasonable and just cause is one of the common-law incidents of all corporations."

[3] Good *vs.* Common Council of the City of San Diego, 1907, Chapter 90, p. 44.

of the incumbent. The procedure for removal is as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least 25 per cent of the entire vote for all candidates for the office of mayor cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, is to be filed with the city clerk. This petition is to contain a general statement of the grounds for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer must add to his signature his place of residence, giving the street and number. One of the signers of each paper is to make oath before an officer competent to administer oaths, that the statements therein made are true as he believes, and that each signature to the paper appended is the genuine signature of the person whose name it purports to be. Within ten days from the date of filing the petition the city clerk is to examine the voters' register to ascertain whether or not the petition is signed by the requisite number of qualified electors. If necessary, the council is to allow him extra help for that purpose, and he is to attach his certificate to the petition, showing the result of his examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of the certificate. Within ten days after such amendment the clerk is to make like examination of the amended petition, and if his certificate shows the same to be insufficient, it is to be returned to the person filing the same; without prejudice, however, to the filing of a new petition to the same effect. If the petition is deemed to be sufficient, the clerk is to submit the same to the council without delay; and if it is found to be sufficient, the council is to order and fix a date for holding the election, not less than thirty days or more than forty days from the date of the clerk's certificate to the council that a sufficient petition is filed.

The council is to provide for publication of notice and all arrangements for holding the election, which is to be conducted and returned in all respects as other city elections. The successor of any officer so removed is to hold office during the unexpired term of his predecessor. Any person sought to be removed may be a candidate to succeed himself, and unless he requests otherwise in writing, the clerk is required to place his name on the official ballot without nomination. In any removal election the candidate receiving the highest number of votes is to be declared elected. Unless the incumbent receives the highest number of votes at the election, he is deemed to be removed from the office upon the qualification of his successor. In case the party who receives the highest number of votes fails to qualify, within ten days after receiving notification of election, the office is deemed vacant.

The new charter for Lewiston, Idaho (Laws, 1907, p. 349), has similar provisions for the recall. In addition it safeguards the city from possible misuse of the law by providing that no petition for removal is to

be filed until the person has been in office at least ninety days, and that no person is to be required to stand for reëlection more than once during the term for which he was elected.

Judicial Interpretation of Direct Legislation

The validity of legislation for the initiative and referendum has been sustained in a number of recent court decisions. The former contention that the use of direct legislation substituted a pure democracy for a republican form of government no longer receives serious consideration.

In a case decided by the supreme court of California in 1906, the court declared[1] that the provision of the federal Constitution (Article 4, Section 4) declaring that the United States shall guarantee to every state a republican form of government, is not violated by the initiative provision of a city charter[2] authorizing direct legislation as to strictly local affairs by the citizens, in case the council refuses to enact the same. In an earlier decision[3] the supreme court of Oregon similarly held that the initiative and referendum amendment to the Oregon constitution did not abolish or destroy the republican form of government, or substitute another in its place. The court declared: "The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power."

Madison defined a representative government to be "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a given period, or during good behavior."[4]

Recent court decisions seem to be returning to this inclusive idea of representative government. On the basis of this broader interpretation, direct legislation may prove to become one method of making representative government more representative.

THE EXTENDED SPHERE OF LEGISLATIVE ACTION[5]

By Justice Simeon E. Baldwin

Contrast, if you will, social regulation by the state as it bore upon the individual in our earlier days and as it bears upon him now.

The manufacturer finds his field of activity contracting. In one state he cannot distill or brew; in another he cannot make a cigarette.[6]

[1] In re Pfahler, 1906, Chapter 88, p. 270.
[2] Charter of Los Angeles, Cal. Laws, 1903, Chapter 6.
[3] Kadderly *vs.* Portland, 1903, 44 Or. 118.
[4] The Federalist, p. 302.
[5] From an address before the Georgia Bar Association, 1909. Reproduced by permission.
[6] Iowa Code, sect. 5006; Act of February 28, 1905, of Indiana; State *vs.* Lowry, 166 Ind. 372; 77 Northeastern, 728.

Formerly, if an employer preferred to have none in his service who did not share his political opinions, he could discharge such as voted against the candidates of his choice at public elections. Now the state may be found punishing him for so doing by fine or imprisonment.

Once every official was free to take an active part in political campaigns. Now it would be a cause of removal in the case of very many.

Once every man's house was his castle, subject to the right of the state to take it from him for the strict purposes of government, on making him just compensation. Now the state may thus seize it for a pleasure ground, a band stand, a memorial site, a hospital, a college, a free library.[1]

Once his farm was his own, to plant and till as he might please. Now some public official may invade his orchard, uproot his trees, and leave him without remedy, if the state deems it necessary or expedient for the public welfare.[2]

The owner of a wood lot was formerly free to cut it when he pleased and as he pleased.

He may now be ordered by the legislature to refrain from cutting the whole or part of the natural growth for a period of years, and left to find his compensation only in the fact that this is deemed to be for the greatest good of the greatest number.[3]

If one owns land from which comes oil or natural gas, he must, on the one hand, guard against waste, and on the other, refrain from increasing the natural flow to the prejudice of his neighbors.[4] Similar statutes have been upheld in reference to the use of water from artesian wells.[5]

The riparian proprietor on streams not navigable has long been compelled in many states to submit to the flooding of his land by others, to create water power for them to put to milling or manufacturing purposes.

He now finds his fishing rights curtailed or perhaps denied for years, in order to secure replenishing the stream with more fish for others to catch and eat.[6]

A grazier or butcher could formerly dress his meat products for such purposes as he saw fit. Now, if he should use his tallow to make a cheap substitute for butter, he might find himself under arrest as a criminal, and liable to a sentence to imprisonment.[7]

Once a man could educate his children as he pleased, or not at all. Now the state may compel him to educate them in a certain way.

In obedience to its commands he sends them to a public school, and

1 United States *vs.* Gettysburg Electric Railway Co., 160 U. S. 668.
2 State *vs.* Main, 69 Conn. 23, 36, 37; Atlantic, 80; 36 L. R. A. 673; 61 Am. St. 30.
3 Opinion of the Justices, — Maine, —; 69 Atlantic, 626.
4 Ohio Oil Co. *vs.* Indiana, 177 U. S. 190; Manufacturers Gas Co. *vs.* Indiana Gas Co., 155 Ind. 467; 50 L. R. A. 768.
5 Ex parte Elam, 152 Cal. —; 91 Pac. 811.
6 Freund on the Police Power, sect. 419.
9 Powell *vs.* Pennsylvania, 127 U. S. 678.

the state may refuse to receive them unless they are submitted to vaccination, although he may regard it as both unnecessary and dangerous.[1]

He may think that he provides them at home with food sufficient for their wants, but if a school committee think otherwise, he may be forced to pay for other meals furnished by them and charged to him.[2]

Formerly a private school could be open to all whom the master thought fit to receive. Now it may be made a criminal offense to admit children of different colors.[3]

Once, if a man contemplated marriage, no considerations of personal health need debar him from a free choice. Now the state may forbid him, under heavy penalties, from marrying an epileptic or one of feeble mind.[4]

Here one may remark a reversion to the ways of thought in ancient society. There the individual was merged in the family. His good was not thought of, but the good of the head of his house and of all the members of that house.

Not dissimilar in origin is the public school.

The family formerly was its own educator. Then came the church, acting through parochial schools and monasteries. Last appears the state, declaring that the liberty of the father may be justly restrained in the interest of the child, and also in the interest of the public.

The man should be accorded more freedom of will than the child, and yet that freedom, as respects the child, may fairly be curtailed in the child's interest.

He may be justly compelled to send his children to school. He may be justly compelled not to send them to the factory.

Compulsory education is the sole salvation of modern government. "Educate your masters" was the only cry that could wake slow-moving England to her duty.

Why is the German a leader in the domain of knowledge, of industry, of military power? Because, for one thing, Prussia led Europe in forcing her people to send their children to school. In the German army there was, in 1904, but one man in every twenty-five hundred who could not read and write. In the French army, in 1906 and again in 1907, there were eighty-three in every twenty-five hundred who could not.

The distribution of one's estate by will, with few limitations, was, up to recent times, left mainly to his discretion, provided he were not grossly unfair to his next of kin; and their title to succeed, if there were no will, was commonly regarded as in the nature of a vested right. Now the

[1] Morris *vs.* Columbus, 102 Ga. 792; 42 L. R. A. 175. As by Kentucky Act of March 22, 1904.

[2] An act of Parliament to this effect was passed in England in 1906, Chapter 57, and the courts support it.

[3] Berea College *vs.* Commonwealth, 29 Ky. Law, 284; 94 Southwestern, 623; S.C. 211 U.S.

[4] 2 Howard on Matrimonial Institutions, 400, 477, 480; Gould *vs.* Gould, 78 Conn. 242; 61 Atlantic, 604; 2 L.R.A. (N.S.) 531.

state demands a share for itself, and one that is to be increased progressively with the magnitude of the inheritance.

The artificial person has lost more even than the natural person. Its field of action is continually being circumscribed; its manner of action continually subjected to new limitations.

It may have large interests that would be injuriously affected by legislation favored by a political party on a certain subject, say the tariff. Formerly it could cast its influence against such legislation, contributing to the expenses of the opposing party. Now such action would constitute a crime.

But it is not so with all artificial persons.

Once, if a malicious prosecution were brought against a man, whoever brought it could be held answerable in court for the resulting damages. A corporation had no more immunity from such an action than the humblest individual. The courts looked through its intangible form to the real men who composed it and held it liable for what they did.[1]

But by the Trades Dispute Act, passed by the parliament of England in 1906, no action for a malicious prosecution nor any other act of private wrong can be maintained against any trade-union whatever.

In a recent judgment,[2] dismissing such a case, the judge (Mr. Justice Darling) observed that the object of the act was to alter the law on that subject as laid down in the Taff Vale case,[3] "and to remove trade-unions from the humiliating position of being on a level with other lawful associations of his Majesty's subjects; adding that trade-unions are now *super legem*, as the medieval emperor was *super grammaticam*."

The individual laborer has also been often treated by our legislators like a ward incapable of protecting his own interests. The number of hours for which he can agree to work in a day have been cut down, and his liberty of contract in many other directions circumscribed.[4]

On the other hand, the power of the state has often been exerted to depress that of organized labor.

It has regulated and, under some circumstances, forbidden strikes. It has forbidden boycotts. It has forbidden (though it knew it not) combinations of labor in different states in restraint of commerce between those states.

But there is no time to multiply references to a kind of legislation with which every man before me is familiar, and in shaping which many of whom have had a part.

It is the age of collectivism. The functions of the state multiply. Its circle of activities expands, and the circle of activities around each individual is correspondingly reduced.

1 Goodspeed *vs.* East Haddam Bank, 22 Conn. 530.

2 Barry *vs.* Amalgamated Society of Railway Servants, *Law Journal*, March 2, 1908, p. 174.

3 L. R. Appeal Cases of 1901, 426, Chapter 47.

4 See N. Y. Labor Law of 1906; People *vs.* Williams Engineering Co.,— N. Y.—; 85 Northeastern, 1070.

The hand of government has always been heavier in countries without a written constitution than in those which possess one.

We have not quite got back to the practice of Egypt in the times of her pyramid builders. Then the hours of washing, of walking, of all the amusements and occupations of everybody's day, of the quality and even the quantity of his food, were precisely regulated by the law of the land. But we have embarked upon a stream which flows that way. We are part of a great world fleet sailing in the same direction, the ships of state of Australia and even of England leading in the advance.

LEGISLATIVE APPORTIONMENT[1]

By Elihu Root

The next question is as to the particular scheme of apportionment that is to be presented to this convention. Is that fair? At the basis of that, sir, lies the question which must be determined upon before we can agree upon any apportionment. The question has been raised somewhat in the attacks upon this bill, but not debated fully or broadly, whether in dividing the state into Senate and assembly districts, we are to have regard to county lines. Having determined that we are to have an apportionment, you must next determine the question whether you will regard county lines or will throw them aside. It does not seem to me that it is necessary or profitable to debate that very long. I do not consider that the gentlemen who have attacked this bill seriously propose that county lines should be thrown away. It certainly would require long and serious consideration before any convention would undertake to abolish so time-honored an institution, and one with which all the habits, associations, and traditions of the people are so closely associated. I should hesitate very long, sir, before I should vote to destroy the boundaries or existence of my old county of Oneida. I believe that every gentleman upon the floor of this convention, whether he lives in the great cities or still remains under the rooftree of his fathers in the rural counties, — that any gentleman who has ever passed his childhood in one of the rural counties of the state would be exceedingly unwilling to destroy its existence and blot it out. The habits of our people, their traditions, their best and noblest sentiments, are embodied in the pride which they feel in the counties of their birth and of their life. These counties originally meant something. They still mean something. Destroy them, and, in order that there shall be political divisions at all, in order that the state may be districted for senators and assemblymen, you create new lines, new divisions, in which people are to create new friendships, which any future convention may destroy. You destroy an institution of immense and immeasurable value and create another

[1] From a speech in the New York Constitutional Convention, 1894.

which, in the future, can be destroyed by some future convention. No, sir, I am satisfied, and I believe all the people on this side of the convention are satisfied that the people of the state do not wish to destroy their county lines in the distribution of senators and assemblymen.

Well, sir, if you wish to preserve county lines, how are you to distribute senators and assemblymen among these counties? And the next question you meet is, What shall be the number of senators and assemblymen? Shall we keep the thirty-two and one hundred and twenty-eight that we now have, or shall we go to another number? Now, as I understand the proportion which underlies the establishment of the numbers of fifty and one hundred and fifty in place of the thirty-two and one hundred and twenty-eight, it is in its main feature this: the convention of 1846 divided the state into Senate districts with express and special reference to the convenience of the people, the relation of the counties in the district, the ability of the representative in the Senate to become familiar and remain familiar with the varied interests and wants of the people and with the people themselves. If a district is too large, if it be of a shoe-string character, stretching over a long, extensive territory, if it be divided by natural obstacles, if it be like the present apportionment where one district comes down into the middle of another, so that you have to go around Robin Hood's barn to get into it, the representative that comes from the divided district will be familiar with the wants and needs of the people in only his part of the district. The constitution of 1846 divided the state into Senate districts and fixed the number of the Senate at thirty-two, so that each senator could readily represent his district. Since that time increase in population has occurred in the great cities, and the effect of reapportionment, with the number remaining at thirty-two and giving new senators to the great cities, is to take away senators from the country, so that the country districts have been continually enlarging until they have reached a point where a senator cannot properly represent the whole people of his district. The main object of fixing fifty as the number of senators is to bring the senatorial districts, widely extending as they are in the country, back substantially where they were with thirty-two under the apportionment of 1846. So that the evil arising from the continual enlargement of the districts, because of the continual sending of new senators to the cities, will be removed by the increase of number.

Now, Mr. Chairman, when we are considering what number a legislative body should contain, what is the proper process of reaching a fair conclusion? Is it to start, as some of my friends, under the influence of their prepossession and prejudgment, have done, looking first at what the political effects will be? Is that the proper way to consider matters in this body, — to see how it is going to affect this or that party, this or that candidate? I think not, sir. There are two questions which should, by a fair and honest consideration, be determined, and one is that to which I

have just referred,— the question as to what extent of district can properly be represented by a single representative, — and the other is, What is an effective working size for the body which is to be constituted.

Now, I am free to say, for the reason that I have just mentioned as to the representation of individual districts, and upon the teaching of common experience, the number of fifty which is fixed in this bill as the number of the Senate, meets both of these requirements. It puts the senatorial districts each in such a position that they can be well represented each one by a senator, and it puts the Senate at such a point that it can properly perform the peculiar functions imposed upon it by our system of government, — functions calling for great consideration and requiring in their deliberation a small body of men.

In the assembly the question rises to some extent; if you regard counties and are not to destroy them, each county must have its representative, and with one hundred and twenty-eight as the number of the assembly, the giving of a representative to each of the small counties produced a very great advantage on the part of those counties and a comparative disadvantage on the part of the large counties and of the great cities. The increase of number from one hundred and twenty-eight to one hundred and fifty is a concession. Now, Mr. Chairman, I don't want any misunderstanding about this, and I put it to the gentlemen who have attacked this bill whether it is not true that an increase of the number of the assembly from one hundred and twenty-eight to one hundred and fifty is a concession by the small counties to the large counties in the city; whether Putnam County, with its thirteen thousand population, is not getting less advantage over the rest of the state with one out of one hundred and fifty, than she now has with one out of one hundred and twenty-eight; whether every one of the small counties that has a single member is not surrendering an advantage which each now has with one hundred and twenty-eight? That surrender on the part of the small counties, which are, perhaps, securing advantage by the redistricting of the state for Senate districts, securing closer contact with their member of the Senate, — that surrender is pushed just so far in order to maintain a representative body which is small enough to do effective work in the legislature of the state.

Now, Mr. Chairman, somebody, in order to successfully dispute this bill, is bound to give us some reasons why these numbers ought not to be adopted, — some reason why different numbers will make a better working Senate and assembly and secure better representation in the Senate and assembly districts. You cannot overthrow the bill by merely crying politics.

Now, as to the actual distribution of counties, the actual formation of the Senate and assembly districts outside of the city of New York, I will say nothing because I am not familiar with the subject. Those who have spoken and others who are to speak, I presume, are much more

competent than I am, or ever hope to be, on that subject. As to the division of the senatorial districts in the city of New York, it was made upon what I suppose to be the true, indisputable, and fundamental principles of apportionment, and that is, following the lines of homogeneous population and the lines of easy communication. The city of New York, as every one in this convention knows, is one in which communication is up and down, north and south. The people do their business and travel along the avenues which run north and south — Avenues A and B, First Avenue, Second Avenue, Third Avenue, Fourth Avenue, Fifth Avenue, Sixth Avenue, Seventh and Eighth Avenues. Communication across from river to river is slight. People will live a whole lifetime upon Manhattan Island without ever getting across from river to river. Lines of business run north and south, the people who know each other, the people who are engaged in business with each other, the people whose public sentiments are the same, they are arranged up and down the island; and we have endeavored, and I think successfully, to lay out the senatorial districts in such a way that the people from any part will connect with any other part most readily; and that each district will contain, to the greatest possible extent, the most perfectly homogeneous people, so that these twelve districts will come as near being real districts as possible, just as twelve different counties are real districts. Now, gentlemen, say that the result of this is, that there are two Republican districts in the city. That results, Mr. Chairman, from the fact that where more than one third of the voters are Republican, you cannot lay out the land in twelve senatorial districts without having at least two that are Republican, unless you violate every proper rule of apportionment. If you follow right rules in a city where one third of the voters are Republicans, at least one sixth of the assemblymen will be Republican, and nothing but deprivation of right will prevent it. That intentional deprivation of right the people of New York City now suffer under, and one reason why we ought now and here to adopt a new apportionment as a part of this constitution is to overthrow a right and set up a wrong for these people. [Applause.] Talk about lack of representation! Mr. Chairman, there are a hundred thousand voters with their families in that city; more than one hundred thousand men who voted for Harrison in the last election, with their families, call them five to one; there are a half million of people without one representative in the Senate of this state, and with the districts of that island so cut up by intention that they can never have a single representative in the Senate of the state; and yet the gentleman says to us, "It is partisan for you to make any apportionment at all."

Mr. Chairman, I have something to say also about some of the rules that are laid down in this amendment. The objections which are made seem to be chiefly to the rule relating to ratio. That is the rule which imposes upon the large cities a somewhat larger ratio than that which is applied to the large Congress, and the rule that provides that no large

city, no county having a specified number of senators, shall have an additional senator, except upon a full ratio. I am trying to state fairly the two things which I find the gentlemen have attacked in that respect. Now these two provisions are attacked upon the theory that population, and population only, is the basis upon which an apportionment shall be made, and that any provision which departs to any extent from the rule of population is wrong in principle and some sinister motive could be found for it. I take issue with that, sir. I assert that population is not the only rule; that the object to be attained is true representation. There is to be combined with population as the basis of representation also the question of territory and the question of separate and individual interest. I say, in the second place, that the comparison is not between a single ratio of population in a small county and a single ratio of population in a large city; the question is not whether 38,606 men in the country should have greater effect given to their votes than 38,606 men in the city. The question is whether thirty separate counties of 38,606 each, scattered over the country, are to be compared upon the basis of absolute numerical equality with one center of thirty times 38,606 in one city, with all the multiplication of power that comes from representing a single interest, standing together on all measures against a scattered and disunited representation from thirty widely separated single centers of 38,606. Thirty men from one place owing their allegiance to political organization, representing one community voting together, acting together solidly; why? They are worth double the scattered elements of power coming from hundreds of miles apart.

. . . . . .

Mr. Chairman, when we adjourned this afternoon I was discussing the question of ratios and of the two provisions which discriminated in favor of the country and against the cities, by fixing a smaller ratio for the country counties than is fixed for the larger counties and the cities, and providing that no city having more than a specified number of senators shall have another senator, except upon a full ratio. I had stated that there were two reasons for not applying a strict rule of representation according to absolute population to the whole state, and that those two reasons were, first, that territorial extension, variety and separation of interests, upon the one hand, required a representation which was not necessary for the other, when there was a condensation in the great centers of population; and, in the second place, that the great increase of effective force which comes from the election of a large number of representatives of one city, — representatives who represent not, in fact, their separate districts, but the whole city, representatives who are responsible to the same public opinion, and, in fact, represent but one combined interest of the citizens of that city, — the great accumulation of power created by that combination so far outweighed the effective power of a great number of scattered representatives of widely divided centers

of population, small centers of population, that a difference in the ratio, such as is preferred in this amendment, goes but a small ways toward equalization.

Now, Mr. Chairman, let me say a word upon this last proposition. In the city of New York there are thirty assembly districts. Under this proposed measure there are to be thirty-five. I would venture to say that a majority of the people of the city of New York cannot tell the boundaries of 10 per cent of the assembly districts of that city. I will venture to say more, — that not more than one third of the people of the city can tell what assembly district they live in. I will undertake to say that not 10 per cent of the people of the city of New York can tell what election district they live in. The boundary lines are so far statutory and matters of words; the distinctions between the artificial divisions of assembly districts and of senatorial districts, and aldermanic districts and civil-justice districts, and election districts, are so shadowy, in fact they are so largely a matter of statute and so little a matter resting in real distinction of population, that people do not know anything about them until they come to study their tickets just before they go to the polls, or look into the newspaper to see where they are to vote. A resident in one of our great cities — it is so in New York and it is getting to be so in Brooklyn and it will soon be so in Buffalo — has not for his neighbor the man who lives next door; the chances are he does not know who he is or what his name is, and would not recognize him if he met him in the street. His neighbor is somebody who lives four or five miles off, whom he meets at church, at a club, at a directors' meeting, or perhaps in a labor organization, or in one of the various associations which make up the busy and complicated life of a great city. Locality counts for nothing in a great city. Every man who is sent to the legislature from a great city represents not this artificial territory, this territory artificially defined; that is but a means of determining what voters shall pass upon the question of whether he or another man goes to the legislature. But he represents the whole city; every representative of every part of the city represents the whole city, and no special part of it. The interests of all the thirty members from New York will be one interest. There is not interest of the fifteenth district as distinguished from the sixteenth, or the seventeenth, or the eighteenth, or the nineteenth as distinguished from the twentieth, or the twenty-first, or twenty-second. Each is for all; all are for one. Each is responsible to one political organization of the city. Each is charged with the duty of representing, and discharges the duty of representing, or, too often, misrepresenting, the whole interests of the people of the city. Now, sir, we are to compare this compact body of men, each one of them representing precisely what the others represent, thirty men as it is now, thirty-five as it is proposed to be, extending in one solid phalanx, to represent one interest, — we are to compare that with the representation of Putnam County, St. Lawrence County, Oneida

County, Cattaraugus County, Monroe County, — gentlemen representing entirely different interests and responsible to entirely different constituencies, with no cohesion, no common bond, except as they may happen to have spoken upon a subject which comes before the representative body. And I submit that upon sound principles the comparison between these separate bodies and their representatives and this one great consolidated body is not, and cannot be, a mere numerical comparison. Carry this to its logical conclusions, if you please. Take the view taken by our friends on the other side. See the city of New York growing year by year, adding Brooklyn perhaps to a Greater New York, and, within the allotted space of life of the majority of the members of this convention, holding within its limits a majority of the people of this state; she sends to your legislature a majority of all its members, responsible to one political organization in that one municipality, — responsible, if the present system of political domination which now obtains in that city is continued, to one man for their votes and their actions, — and tell me whether, for the government of this state, it is right and just that the comparison between all the other representations of this state, all the other counties, and all the other cities, extending over half a thousand miles from east to west and from the ocean to the St. Lawrence River, with their varied interests, with their widely scattered centers of population, — whether the comparison between the representation and this one controlling power should be solely on the basis of population. If that principle be pushed to its logical conclusion, every county, every city, every town, every village, every man in the state of New York becomes subject to the absolute domination and control of the delegation from New York. I for one, sir, New Yorker as I am, beholden for almost thirty years of kind treatment to that city, love too dearly the state of my birth and my life to contemplate such a result with equanimity. And I insist, sir, upon the principle which has been adopted in a large number of the states of this Union, in almost every state which has had to deal with the problem of a great city within its borders, and the relations of that city to an agricultural community, that the problem which they have had to deal with shall be dealt with by us upon the same principle; that the small and widely scattered communities, with their feeble power comparatively, because of their division, shall, by the distribution of representation, be put upon an equal footing, so far as may be, with the concentrated power of the cities. Otherwise we never can have a truly representative and a truly republican government.

LEGISLATIVE APPORTIONMENT IN CONNECTICUT[1]

By Governor McLean

The constitution of the state of Connecticut, like those of her sister republics, always has been, is now, and always will be complained against by good and patriotic men.

The state of Connecticut is, however, by the testimony of all her loyal sons, as good a state to live in as there is in the Union.

Many of her blessings are due to the wealth and variety of her natural endowments, but many more are due to the wisdom of the fathers who laid the foundations of her government in the adamant of morality and justice.

For more than two centuries the fundamental law of Connecticut has been the admiration and inspiration of the representative republics of the world. And if the citizens of Connecticut have preferred stability to uncertain change, their choice has brought them great prosperity and the reputation of being a people of steady habits, which, with God's help, may they long retain.

Nothing is so destructive of credit and the general well-being of society as constant modification of fundamental law, and injustices in a constitution offending theory only may well be preferred to experimental attempts at impossible ideals.

The general plan of our constitution in its protection against the wrong kind of liberty is, in the judgment of many, better than that possessed by any other state in the Union. I do not say that it is perfect. Perfection is hard to find in temples made with hands.

We are told that a perfect form of government is possible, and that it will be the one that runs in exact harmony with the immutable laws of nature. This may be true, and when discovered, still be unsatisfactory, for some of the best of us will, I fear, always find occasion to criticize natural regulations.

On the other hand, we need never fear to remedy a manifest wrong in fundamental law, if that wrong clearly affects a majority of the people. And the minority, however dearly it may cherish the law that causes that wrong, should remember that the very life of a democracy depends upon the patriotic obedience of all to the will of the majority. We must expect to amend our constitution for years, if not for centuries, to come. We should be willing and even glad to do so, when natural causes that could not be foreseen have, in the course of time, rendered an amendment a plain duty.

In 1639, when the state had but three towns, each town was given four deputies to the General Court, and it was further provided in the first of written constitutions that whatever other towns should thereafter be added to Connecticut, "they shall send so many deputies as the court

[1] Extract from Governor McLean's message of 1901.

should judge meet, a reasonable proportion to the number of freemen that are in the said towns being."

It was then the definite expressed purpose of the founders of the state to give to each town such number of deputies as would be in reasonable proportion to the number of freemen therein, and to every town some representation. It cannot be denied that this apportionment was conservative, wise, and just.

At present, owing to a very large increase in the population of some towns, and very little, if any, in others, it is theoretically possible for less than 20 per cent of the people of Connecticut to elect a clear majority of both branches of the general assembly, and so secure absolute control of the entire state government; and, as an adjunct to this unanticipated departure from the original intent of the founders, some towns having a population of less than five hundred retain two representatives, while others having ten times that number are entitled to but one.

Some of you may be tempted to point to the proposed increase in the Senate as fully satisfying the spirit of the constitution. I cannot see wherein this amendment can be soberly considered as a remedy for the real and growing injustice in the apportionment of the representation in the House. The Senate in name, purpose, and history is the smaller and conservative body, and it should in my judgment remain such.

There are at present eighty-seven towns having two representatives and eighty-one towns having but one. If each town is given one representative, and there is added to every town exceeding a certain population one representative for each ten thousand or more of such excess, you will fairly and substantially remove the present injustice and still retain the federal or territorial element in the present constitution.

It is a compromise, but an honorable and logical compromise, in which the people gain much and the towns save much in retaining a privilege which to them is an education and a dignity as dear and sacred as it is conservative and beneficial to the state.

A reapportionment that would entirely deprive the smaller towns of their individual representation would be a radical and complete departure from the plan of the founders, and I fear that any attempt to secure such a reapportionment would be as unsuccessful as it would be unwise. Many of us still believe in the little town republics. And whether they created the state or the state created them, they have lived together in harmony and stood shoulder to shoulder in defense of each other and the state too long to become antagonists now.

If, upon careful and unprejudiced deliberation, you become convinced, as I am convinced, that a fair reapportionment of the representation in the coördinate branches of the general assembly is due to, and greatly desired by, a large majority of the people of Connecticut, the manner in which the constitution shall be altered to allow such reapportionment will be of next importance.

You will hear much about the necessity of a constitutional convention from many zealous and farseeing men, but I caution you that in adopting this plan you would open the door to guest and stranger alike and throw the key away. I can see no argument in favor of this irregular, expensive, and wide-open policy but that of speed. It is cutting across lots in the dark with many ditches to avoid, and some of us were wisely taught by our fathers that "the longest way around is the shortest way home." There is ability enough and to spare in this assembly to compile, if thought best, the nineteen pages of our present constitution, save the living provisions, and add thereto such changes as you may approve.

The constitution so compiled and amended would be printed with the laws enacted by you and freely circulated and discussed during the next two years, and when finally submitted to the people it could be voted for intelligently and without fear of hidden flaw or deception.

It should also be remembered that most of the vital provisions in our present constitution have been judicially construed by our supreme court, and any change in the text, however slight, might entail much hardship, uncertainty, and expensive litigation.

In view of the large number of self-professed experts in constitutional surgery, who, anticipating the pleasures of unrestricted vivisection, have already provided themselves with knife and antiseptic, you will, in my judgment, serve and please the people best by permitting the use of such remedies only as may be necessary to preserve the vigor and spirit of the trusted guardian of the people's rights.

The proposal to require the election of county commissioners by the people, and all similar tilting for party advantage, have no place in this discussion, and should in my opinion occupy but little of your time. The constitution is a limitation and should never be made a code.

If any change is needed in the manner of choosing county commissioners or the judges of our minor courts, it does not, I think, lie in the direction of the town caucus.

The amendment now pending which provides for plurality election of state officers, although clearly undemocratic in theory, is abundantly approved by precedent and experience, and until some plan is devised whereby a majority can express its choice at one poll it will be more satisfactory than the present ultraconservative method.

THE LAW AND INDUSTRIAL INEQUALITY[1]

By George W. Alger

Has the state ever a clear duty to lend a hand to aid those who are obviously at a disadvantage in struggling with the forces of modern industry? Under our fundamental law and the principles declared in our

[1] A paper presented before the New York State Bar Association, January 16, 1907.

Constitution, can our legislatures and courts recognize not only the facts of existing industrial inequality between men, but a duty to protect by law, framed to meet new conditions, the weaker against the stronger? When individual action alone cannot secure equalization of the conditions of competition, and where that failure is resulting in misery and distress, may the law intervene to protect the weak from the tyranny of the strong? Are the handicaps of life to be questions solely for the individual, or are they at times and under special circumstances to be questions for the state itself to grapple with, and if not to solve, at least to create conditions under which the individual may solve them for himself?

These are difficult questions which our courts with increasing frequency are being asked to answer when required to determine the validity of laws which our legislatures and Congress are yearly enacting, — laws regulating or fixing the conditions under which industry shall be carried on; limiting the hours of labor of women and children, and men as well, in overcompetitive employments; laws aimed to reduce unnecessary dangers to life and limb in dangerous trades, or dangers to health in unhealthful occupations; laws which, by increasing the employer's responsibility, seek to urge him to new diligence in the protection of his employees; laws which, in a multitude of ways, aim to control or regulate as special necessity may dictate the processes of industry, to remove conditions which press too heavily upon the overburdened, and which, uncontrolled, sap vitality and destroy or shorten life.

The general problem which these questions raise, and which involves both the power and the duty of the state, would seem to have been answered in all the great civilized countries of the world but ours in the affirmative. Many of these questions were settled in European countries long ago. Economic conditions which gave them urgency earlier in the Old World have more recently come to us, and the form of the problem which these new conditions have raised as it is presented to our country is, How far may the legislatures go in enacting laws aimed at conditions of industrial inequality under the limitations of the law of the land?

Our fundamental law has for one of its principles that of equality, — that before the law men are equal in rights, privileges, and legal capacities. It has for another principle individual freedom, — the right of the individual, uncontrolled by any arbitrary trammels of the state, to pursue any proper calling and to contract with others in relation to that calling. The liberty to pursue such calling is a property right, is a part of the liberty and property which shall not be taken away without due process of law.

History would seem to show that for the first seventy-five years at least of our national life individual liberty was the dominant note. We were opening a new world. In it there were apparently innumerable opportunities for individual enterprise and initiative. Our national life began, moreover, with greater industrial equality than had before existed in any other country. The Industrial Revolution had not yet begun when

American independence was declared. We were then an agricultural people, for England, hoping to keep us a market for her manufactures, had forbidden the export of machinery to her colonies. The spinning machinery of Arkwright was not brought to us until after the war. The power loom was not invented until 1785. There was not a factory in the United States when the Constitution was adopted. The artisan was his own master and worked with his own tools or on simple machinery which, by moderate savings, he himself might own. There were no great fortunes in the modern sense, no great corporate organizations of wealth, no factory system. Is it to be wondered at, that beginning thus with such a marked general condition of industrial independence amid a wealth of natural opportunities for personal success, our law should for so long have kept dominant the idea of individual personal freedom? Is it strange that in the pursuit of individual fortune the interests of the state were often neglected, or that opportunities for unjust advantage, conferred by unjust law on the few or seized by them in spite of law, failed to receive general public interest among citizens too much absorbed in their own personal affairs to be aroused by the abuse of the powers of the state?

With the passage of time, however, with the industrial changes which have made an agricultural colony a power in the markets of the world, have come changes in our attitude toward the law, — changes produced largely by economic variations. The modern note is not simply individual freedom; it is social freedom, — not freedom from law, but freedom by law, and in that freedom equality of opportunity. Along with the tardy legislation which aims through law to repair the oversights and blunders of the past and restore so far as may be that equality of opportunity, which seeks to take away privilege and unjust enrichment, to prevent transportation discriminations, and to reduce the advantages in competition of fraud over honesty, comes legislation of another kind which aims at the industrial welfare of the many by limiting the individual freedom of the few; by imposing new duties on the strong for the protection of the weak.

The greater part of this protective legislation must find its justification, if at all, before the courts, through the police power. The old theory of legal equality, based upon the existence of industrial equality, finds itself in conflict with the facts of life. Unless the state must admit itself powerless to deal with new conditions of modern society, authority must be found in the police power to meet their demands for law. The constant expansion of that power in the last fifteen years, as expressed in legislative enactments and in the increased bulk of decisions sustaining these enactments, seems to indicate an almost conscious purpose of society, constrained by its own necessities, to limit the range of individual freedom. This growth of the police power is one of the marked features of modern American law.

It is with great wisdom that the courts have refrained from defining the police power lest it crystallize by definition and lose its capacity to expand. In it is contained the reserved right of the state to preserve its own growth, to make provisions for new conditions as they appear. It is the law which must find its authority in the needs of the present and not solely in the traditions of the past. It is because that law is so obviously in a state of evolution that the courts have refused to say where the constitutional boundaries limiting its exercise are to be fixed.

As a part of the expansion of the police power the courts have declared in a number of cases the right of the legislature to enact laws not only for health, safety, or morals of the general public, but for the protection of individuals whose condition gives them special need of legal protection, or whose individual freedom has lost in a measure its reality through economic pressure. Industrial inequality is being recognized as a justification for the exercise of the police power in aid of the health, safety, and well-being of citizens suffering from its burden. In Holden *vs.* Hardy (169 U. S. 366), the case in which the United States Supreme Court upheld the constitutionality of the Utah Eight-Hour Law for underground miners, the court, after considering at some length the conditions injurious to the health in the miner's occupation, observes:

> The legislature has also recognized the fact which the experience of legislatures in many states has corroborated, that the proprietors of these establishments and their operators do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength; in other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide and the legislature may properly interpose its authority. . . . The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected the state must suffer.

The same court more recently, in Knoxville Iron Company *vs.* Harbison (183 U. S. 13), was called upon to test the validity under the fourteenth amendment of an act of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due employees. In upholding the law the court quoted with approval the decision of the supreme court of Tennessee:

> The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition

in some measure by enabling him or his *bona fide* transferee, at his election and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and so far as calculated to accomplish that end deserves commendation.

How great the industrial inequality must be, how far the worker must be unable to protect himself to justify police legislation for his betterment, are still open questions. But the courts have declared that the state may act to protect women and children against excessive labor (Wenham *vs.* State, 65 Neb. 394, 91 N. W. 421; Commonwealth *vs.* Hamilton Mfg. Co., 120 Mass. 383; State *vs.* Buchanan, 29 Wash. 602); that it may provide regulations for greater safety and comfort of factory and railway employees (People *vs.* Smith, 108 Mich. 527; State *vs.* Whitaker, 160 Mo. 59; State *vs.* Nelson, 52 Ohio St. 88); that it may change the common law and take away defenses in actions for personal injuries which heretofore existed (Ry. Co. *vs.* Mackey, 127 U. S. 205; Tullis *vs.* Ry. Co., 175 U. S. 348; Minn. Iron Co. *vs.* Kline, 199 U. S. 593); that it may in certain cases limit the hours of labor of men (in mines: In re Boyce [Nev.], 75 P. Rep. 1; State *vs.* Cantwell, 179 Mo. 245; on street railways, re Ten-Hour Law for street-railway corporations: 24 R. I. 603); that it may regulate to a certain extent the terms and conditions under which employees shall be paid for their services, and prescribe how they shall be paid (Knoxville Iron Co. *vs.* Harbison, 183 U. S. 13; St. Louis, etc., Ry. Co. *vs.* Paul, 173 U. S. 404; Wilson *vs.* State, 61 Kan. 32; Hancock *vs.* Yaden, 121 Ind. 366).

That there is often great disagreement between judges as to the limits of the police power in protective or regulative legislation of this kind, goes without saying. The state courts often flatly contradict one another both as to their own powers and as to the policy of the courts. Compare, for example, People *vs.* Havnor (149 N. Y. 195), upholding a Sunday-closing law for barbers, with Ex parte Jentzsch (112 Cal. 468), both cases being decided in the same year, 1896. The California courts indignantly repudiate any power on the part of the legislature to take away from the barber his constitutional right to work all day on holidays and Sundays, and declare that to sustain such a law would be to send the barbers from the prison to the poorhouse! In spite of the numbers of decisions which have been rendered, the question of what are the limits of legislative regulation or control of industry through the police power is still an open one. The courts have adopted no general policy, and it is fortunate that they are not obliged to adopt one.

The validity or invalidity of protective laws of this character is ordinarily a question for the state courts, and to be determined with reference to state constitutions only. Such is the view which the Supreme Court of the United States has taken almost uniformly in construing exercises of the police power by state legislatures. Numerous state laws

of this kind have been tested in the federal courts to determine whether they violate the fourteenth amendment and its sweeping provisions forbidding the states from abridging the privileges and immunities of citizens of the United States or denying them the benefits of due process or equal protection of the laws. That court has repeatedly declared that the police power was reserved by the states at the time the original Constitution was adopted (Mugler *vs.* Kansas, 123 U. S. 623), and that the fourteenth amendment does not impair its authority (Barbier *vs.* Connolly, 113 U. S. 27).

In Holden *vs.* Hardy, Judge Brown expresses the nonintervention policy of the federal courts and its reason. After reviewing changes by legislation which states have made in the past, he observes:

> An examination of both classes of these cases under the Fourteenth Amendment will demonstrate that in passing upon the validity of state legislation under that amendment this court has not failed to recognize the fact that the law is to a great extent a progressive science . . .; that restrictions which had formerly been laid upon the conduct of individuals or of classes of individuals had proved detrimental to their interests, while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, had been found to be in need of additional protection. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the powers so to amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare, without bringing them in conflict with the supreme law of the land.

The broad scope for legislative action which is thus assured the states is apparent from this and other cases in that court.

As the court says in Gundling *vs.* Chicago (177 U. S. 183):

> Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities in the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference.

See also Patterson *vs.* Kentucky, 97 U. S. 501; Barbier *vs.* Connolly, 113 U. S. 27; Jacobson *vs.* Massachusetts, 197 U. S. 11; Minnesota Iron Co. *vs.* Kline, 199 U. S. 593.

This general attitude of the United States Supreme Court is important in view of the tendency of the state courts, when holding statutes of this kind to be unconstitutional, to make the fourteenth amendment one of the grounds for their decision. No appeal lies to the United States Supreme Court from such decisions, and when the state court bases its ruling on this ground, amendments of the state constitution can afford no remedy. The state courts sometimes are more sensitive to infractions of the federal Constitution than the Supreme Court itself. Our court of appeals, for example, nullified under the fourteenth amendment the Eight-Hour Law on Public Works (People *vs.* Orange County Construction Co., 175 N. Y. 84). No further appeal remained for those interested in sustaining the validity of this law. Shortly after this, however, the United States Supreme Court, in a case involving a similar statute (Atkin *vs.* Kansas, 191 U. S. 207), held that its constitutionality was beyond all question. Not infrequently, when the federal question is thus removed, state constitutions are amended to permit legislation for which there is strong popular demand. In Colorado, before the decision of the United States Supreme Court in Holden *vs.* Hardy, sustaining the Eight-Hour Law for miners, the state court had advised the legislature that a proposed law of the same order would be unconstitutional under the fourteenth amendment as well as under the state constitution (In re Eight-Hour Bill, 21 Col. 29). Thereafter, when the Supreme Court had disposed of the federal question in Holden *vs.* Hardy, the legislature enacted a similar law which the Colorado courts held to be unconstitutional, but solely under the state constitution (In re Morgan, 26 Col. 415). Thereafter (as in New York, after the decision of Atkin *vs.* Kansas) the constitution of the state was amended to permit the legislation desired by the people.

In Illinois a decision (Ritchie *vs.* People, 155 Ill. 98) declares unconstitutional a law prohibiting more than eight hours a day or forty-eight hours a week for the labor of women in factories. Its reasoning is based on the fourteenth amendment and upon the state constitution. The decision is generally regarded by writers on the police power as erroneous so far as the fourteenth amendment is concerned, and *dicta* in subsequent decisions of the United States Supreme Court leave little doubt that the federal question would have been otherwise decided by that court; but, with the decision of the Illinois court placed squarely on the federal Constitution, it is obviously a fruitless task for those interested in the protection of women in industry to attempt to change the Illinois constitution.

The only recent decision of the United States Supreme Court on legislation of the character herein considered, in which the act in question was found to be unconstitutional, is Lochner *vs.* New York (198 U. S. 45), involving our law limiting the hours of labor in bakeries to sixty per week, or ten hours a day. This decision was concurred in by a

bare majority of the court and is narrow in its scope. The court refuses to consider the act as one passed for the health of bakers. It construes the law as one, "the real object and purpose of which was to regulate the hours of labor between master and employees (all being men — *sui juris*) in a private business not dangerous in any degree to morals or in any real or substantial degree to the health of the employee. Under these circumstances," it says, "the freedom of the master and servant to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the federal Constitution." It must be admitted that, if followed in subsequent decisions, the authority assumed in this case over the exercise of the police power by the state legislatures will tend very materially to diminish the powers of legislatures to make laws for conditions within their borders requiring, in their judgment, industrial legislation. If I may venture a personal opinion, it is that the decision is a reactionary one which will not be enlarged beyond its immediate facts in subsequent rulings. The facts themselves which the court finds as a basis for its decision regarding the general healthfulness of the baker's occupation, are themselves contrary to the conclusions of modern investigators, who have found the occupation to be one of unusual unhealthfulness and of extraordinary mortality.

The United States Supreme Court has usually, in reviewing exercises by the state legislatures of the police power, been influenced by a reflection well expressed by Justice Harlan in Atkin *vs.* Kansas (191 U. S. 207, at p. 223), where he says:

> No evils arising from such legislation could be more far-reaching than those which might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice and reason or wisdom, annul statutes that had received the sanction of the people's representatives.

The extent to which the police power of the state shall expand to meet economic and social conditions depends, of course, largely upon the attitude of the judiciary. The judicial policy, as expressed in the courts, has ordinarily been against fixing upon the police power rigid rules. As the supreme court of Nebraska has said in a decision sustaining an act limiting the hours of women in mercantile establishments (Wenham *vs.* State, 65 Neb. 394 [1902]):

> We are unable to find a case where the courts have laid down any rigid rule for the exercise of the police power. There is little reason under our system of government for placing a narrow interpretation on this power, restricting its scope so as to hamper the legislature in dealing with the varying necessities of society and new circumstances as they arise, calling for legislative intervention in the public interest. The moment the police power is disturbed or curbed by fixed or rigid rules, a danger will be introduced into our system which will be far greater than the results arising from an occasional mistake by legislative bodies in exercising such power.

An objection often heard to legislation of this kind comes from those who deny that ethical gains can come through legislation. They say, and it is undoubtedly true, that the courts and the legislatures can by no action of theirs destroy human selfishness or rapacity. If, in the rush for wealth, standards of national honor have been lowered, if we have canonized capital instead of character, — if all this be true (and I do not believe it to be true), then we cannot change the moral fiber of dishonest men by legislation. But admitting all this, and that the law cannot transform the character of the avaricious and cruel, even the most conservative of us must admit that it can, if the limitations of our law will permit, create conditions under which men who are willing to conduct business on a plane higher than that of mere dollars and cents, shall not be ground down by competitors willing to oppress the lives of others to make trade profits. As a wise and yet conservative student of our institutions has said:

> There are some things outside the field of natural monopolies in which individual action cannot secure equalization of conditions of competition, and in these also, as in the regulation of monopolies, the practice of government, of our own as well as of others, has been increasingly on the side of government regulation. By forbidding child labor, by supervising the sanitary conditions of factories, by limiting the employment of women in occupations hurtful to their health, by instituting official tests of the purity or quality of goods sold, by limiting hours of labor in certain trades, by a hundred and one limitations of the power of unscrupulous or heartless men to outdo the scrupulous and merciful in trade or industry, government has assisted equity. Those who would act in moderation and good conscience where moderation and good conscience, to be indulged, require an increased outlay of money, in better ventilated buildings, in greater care as to quality of goods, etc. — cannot act upon their principles so long as grinding conditions for labor or more unscrupulous use of the opportunities of trade secure to the unconscientious an unquestionable and sometimes even a permanent advantage; they have only the choice of denying their consciences or retiring from business. In scores of such cases government has intervened and will intervene by way not of interference, but by way rather of making competition equal between those who would rightly conduct enterprise and those who basely conduct it. It is in this way that society protects itself against permanent injury and deterioration and secures healthful equality of opportunity for self-development.[1]

The danger is more imaginary than real, that these interventions, as President Wilson calls them, of the state in industry would, under a broad construction of the police power by the courts, be too frequent; that individual initiative would be cramped by unnecessary and unreasonable restraints, that handicaps would be placed upon legitimate competition by this type of legislation. Our legislatures, for example, have almost uniformly listened with strained attention to the representatives of great business interests, even when they have opposed the most

[1] Woodrow Wilson, The State, sect. 1278.

reasonable limitations on their powers, the most righteous extensions of their duties and liabilities. We are to-day, for example, behind all other great civilized countries of the world in the protection which our law affords the safety of employees. Such protective laws as have been upheld as to their constitutionality have been almost invariably strictly construed by the courts against the purposes of the legislature. Take a single illustration. In 1847 England adopted as a part of her factory act a provision requiring guards to be placed upon dangerous machinery. It has enforced that law. Forty years later New York adopted substantially the same statute. Her courts, however, have practically nullified it (compare Knisley *vs.* Pratt, 147 N. Y. 372, with Baddesley *vs.* Lord Granville, 19 Q. B. D. 423; Simpson *vs.* N. Y. Rubber Co., 80 Hun, 418, with de Young *vs.* Irving, 5 A.D. 449). Our law, as regards responsibility of employers for industrial accidents, is generally regarded by the learned textbook writers as unjust in important particulars and unsuited to our time. Yet how slowly, how unwillingly have the legislatures increased the responsibilities of employers; how few states have abolished the fellow-servant doctrine or changed the rule of assumed risk. We kill or injure, we are told, over half a million people in industrial employments in the United States every year (see *North American Review* of November 16, 1906, "Our Industrial Juggernaut"). Our own Commissioner of Labor some years ago estimated that in this state we annually cripple, kill, or injure 40,000 individuals in our industrial establishments. Yet, we have made but rudimentary changes in the law. The Employers' Liability Act, adopted in this state in 1902, was not more advanced in its principles than that which England adopted in 1880 and had abandoned as inadequate five years before our own act was made law. Yet our statute took seven years to obtain its passage from the New York legislature. The Federal Employers' Liability Act of 1905, the most far-reaching American law on the liability of railroads to their employees, enacted after years of agitation, and now under a temporary eclipse as to its constitutionality, is not more favorable to those employees than the law of Prussia was in 1838.

With states vying with one another in increasing competition for trade, our legislatures are not likely to impose handicaps which will drive business interests away from their borders. This hesitancy of the legislatures to place these interests at a disadvantage in competing with establishments in other states, coupled with the conservatism of the courts, have generally proved sufficient guaranties against meddlesome and unnecessary legislation, and such guaranties are likely to continue even if the police power be largely expanded to meet new conditions.

The danger from the increase of the police power is not great. The danger from judicial construction of that power which shall stop its expansion is more serious. Our social order has many enemies, enemies who find arguments for presaging its disintegration and decay in the

enormous concentration of wealth, in the growth of the great corporations, in the financial dishonesty which has been so recently exposed in high places, and in the misery and wretchedness of thousands whose lives are exploited in industry. But their arguments, with all the exaggerations and falsehoods which may be added to them by a sensational press, while they may inflame the blood of discontent, will never carry general conviction until the courts have first convinced the people that in the presence of social and industrial wrong the state is powerless to meet conditions which demand law; until the courts have convinced the people that, bound and fettered by an inflexible written Constitution framed over a century ago, the state cannot exercise functions which the present needs of society require it to exercise.

These decisions of the courts which the socialist looks for with eager expectancy — declarations of the paralysis of the state, of its inability to deal with economic problems by law — are, however, few and far between. Reactionary judges there may be at times who refuse to be our contemporaries, who look only to the past to judge the needs of the present, — yet slowly but surely, as public opinion matures, the power of the state is expanding to protect as well as to punish, in a land wherein the recognized rights of the individual include not only liberty but life and a fair field for the pursuit of happiness.

III

THE JUDICIARY

COURTS OF LAST RESORT[1]

By William L. Carpenter

In America courts of last resort occupy a unique position. Our written constitutions distribute the powers of government among three departments, — the legislative, the executive, and the judicial. Who shall determine the limits of the jurisdiction of these several departments? This question is not answered in express words in any of our constitutions. It was answered, however, at a very early date by Chief Justice Marshall, speaking for the Supreme Court of the United States in the celebrated case of Marbury *vs.* Madison. In that case Marshall held that in deciding a controversy according to law, the judiciary — the court of last resort — was bound to apply the higher law found in the Constitution, rather than an opposing law enacted by the legislative department, and consequently to declare unconstitutional, null, and void the conflicting legislative enactment. It followed from this decision and this reasoning that any wrong caused by the legislative department of government exceeding its constitutional limitations could be redressed by the judiciary — by the courts of last resort. And that any wrong committed by the executive department of government in exceeding its constitutional limitations could likewise be redressed by those courts. It also followed from this decision that there was no constitutional means of obtaining redress for a wrong committed by courts of last resort in exceeding their jurisdiction. This decision made the judiciary, as has well been said, the keystone of the arch of government.

Many eminent lawyers denied the correctness of Marshall's opinion. Some eminent lawyers to-day doubt its correctness. The Constitution, it is said, makes each of the departments of government independent and equal. The decision, it is said, destroyed this equality. It made the judiciary, represented by the court of last resort, supreme, — the executive and the legislative departments of government, subordinate. Whether Marshall's opinion was or was not correct — that is, whether he placed upon the Constitution the construction intended by those who framed it — is a question which it would be idle to discuss, for that construction

[1] From an address before the American Bar Association, 1909.

has been universally accepted. It was a wise construction. It furnished a constitutional tribunal to determine every question which might arise. It lessened — perhaps it banished — the danger of disruption of government arising from differences between opposing factions. The principle of this decision was not confined to its application to the national government. It applied with full force to the government of the several states. This has been universally recognized. It may be said, therefore, that as the Supreme Court of the United States is the keystone of the arch of the federal government, so likewise the court of last resort of each state is the keystone of the arch of the government of that state.

It will be observed that this paramount authority of the judiciary rests upon the proposition that it is the duty of the judiciary to determine controversies according to the law; and the possession of this extraordinary authority has never endangered the rights of a free people, because the only way that it could be exercised was by determining controversies according to law. All our constitutions, both federal and state, may then be read as if they contained the provision: Upon the faith that our court of last resort will determine controversies according to law, we, the people, grant it supreme authority. Faith that our courts of last resort will determine controversies according to law is then the rock upon which our governments are built. That courts of last resort must determine controversies according to law is the most elementary of legal principles. This is almost the first principle learned by every lawyer, and this means every judge. Yet it is a principle which should be emphasized and reëmphasized, for it should never be lost to view. It should always be appreciated. It is not always appreciated. I will say nothing derogatory of judges. If there is any one who believes that judges never fail to appreciate this fundamental truth, I am immensely pleased, and I will not attempt to destroy his faith. Certain it is that lawyers do not always appreciate it. If they did, they would not, as they often do, urge considerations calculated to incite feelings of sympathy and prejudice, and thereby hide from the view of the courts the legal questions involved. Nor would they seek to justify such conduct by saying, If I can succeed in convincing the judge of the merits of my client's case, I will take my chances on the law. With this conduct on the part of intelligent lawyers, it should not surprise us that laymen should have obscure views on this question. It should not surprise us that at times they should, in scathing terms, condemn and denounce a judge for deciding a controversy in which they are interested in accordance with law and opposed to their ideas of justice. It is impossible to believe that the man who utters such denunciation and condemnation understands the fundamental truth which I have tried to enunciate. It cannot be that he understands that judges are bound by the most sacred oath to decide controversies according to law; that faith that they should so decide them is the most fundamental of constitutional principles; that

men cannot be accorded equal rights and privileges unless those rights and privileges are all measured by the common standard, — the standard furnished by the law. He who appreciates this truth cannot fail to see that any effort made to induce courts of last resort to disregard the law in deciding controversies is an effort to overthrow constitutional government. I plead not for the execration of the man who makes that effort, but for his enlightenment. He should be made to appreciate the truth. Every citizen should be made to appreciate it. A greater endeavor should therefore be made to teach that truth. It should become a popular truth.

It may be asked, What difference does it make that a judge is denounced for faithfully performing the duty reposed in him by the people? His duty is none the less clear. He has no choice. He must perform it. He must say, as Chief Justice Marshall said in a similar case:

> No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace.

It is none the less a lamentable situation if judges of courts of last resort feel that they cannot decide a controversy according to law without losing the popular favor which alone insures their continuance in office. If such a situation confronts a judge, let us hope that he will conduct himself according to the precepts of Marshall. Every one of us can recall instances of judges who have so conducted themselves, and who have been made martyrs because they did their duty. But the people have no right to subject their judges to any such strain, and if they do, it is to be feared that some of them will not stand the test.

It often happens that the judge who fearlessly performs his duty in disregard of what he believes to be the will of his constituents finds that he has increased instead of diminished his popularity. And I think, too, that it sometimes happens that the judge who shamelessly disregards his duty in compliance with what he believes to be the will of his constituents finds that he has lost instead of increased his popularity. Each of these men believed he was making the supreme sacrifice; one, the sacrifice of his life to preserve his honor; the other, the sacrifice of his honor to preserve his life. Happily for the perpetuity of American institutions, each found himself mistaken. By losing his life for the sake of duty the one found it; by saving his life at the expense of duty the other lost it. These experiences prove, as nothing else can, the capacity of the American people for self-government. There is an obligation on the part of the judge to decide controversies according to law. There

is an obligation on the part of the people to respect him for the performance of his duty. In general it may be said that the people will keep the faith.

The whole duty of courts of last resort, then, is to decide the controversies brought before them according to law. To decide a controversy according to law, the court must perform two duties: first, it must understand the facts so that the real issue is clearly perceived; second, it must find, state, and apply to the determination of that issue the true rule of law. There is a possibility of the court's making a mistake in performing each of these duties. The consequences are more serious if the mistake is made in the performance of the latter duty, for then not only is an erroneous decision made in the particular case, but a precedent is set which affects the rights and duties of every one in the state. Judging from my limited experience as a member of a court of last resort, the mistake most frequently committed, however, is a failure to understand the case, — a misconception of the controlling issue, resulting not, it is true, in unsettling the law, but none the less in an erroneous decision. This consequence is, however, serious enough, for I imagine it would afford little consolation to a defeated suitor to be told that the erroneous decision which denied him his right left the rights of his neighbors unimpaired.

Whenever an erroneous decision pronounced by courts of last resort arises from a failure to understand the case, the office of the argument of counsel has not been performed, for whatever else that argument should do, it should correctly analyze the facts and clearly point out the controlling issues. I think practicing lawyers would be surprised if they knew how often arguments of counsel fail to perform this important service. I am willing to concede that the reason for this failure is sometimes to be found in the inattention of the judges who constitute the court. It must be confessed that judges sometimes do not understand the argument of counsel simply because they do not give it proper attention. I think, however, that it may be said, as a general proposition, that the failure of courts of last resort to understand a case is chargeable to the imperfect argument of counsel. In their anxiety to achieve a victory counsel yield to the temptation of stating the facts from the point of view most favorable to their client's interest. Frequently they undertake to state their case in such a way as to appeal to the supposed sympathy or prejudice of the judges and to blind them to the legal questions involved. More often they bring into prominence immaterial facts which they think disclose equities in their client's favor. They place an undue emphasis upon certain material facts, overlooking other essential facts, and thus contend for a decision in their client's favor upon an issue which is not the true issue in controversy. In all such cases — and such cases are altogether too numerous — the court of last resort must, without the aid of counsel, discover the true issue and the principle by which it is to be decided. It is not surprising that the court, thus compelled to perform

the duty of both judge and counsel, should sometimes fail to perform one or the other — perhaps both — of these duties. There might be some justice in holding that counsel who improperly place the court in this dilemma is estopped from making any complaint. The question arises, What can be done to remedy this grievance? Of course, the most obvious remedy is open to counsel. They should correct their practice. They should state the facts clearly and, above all, fairly. Instead of endeavoring, as many of them do, to place a construction upon the facts most favorable to their client's interest, they should do their utmost to construe them as they should be construed by a fair-minded judge. I am aware that many lawyers will say, "I owe a duty to my client to win this controversy; that duty justifies the practice you condemn." This is taking too narrow a view of our profession and of our professional obligations. We have no right to make the winning of suits the supreme object of our professional career. We should be faithful to every duty we owe our client, but we should never forget that we owe duties to society and to ourselves. These latter duties are paramount. Our client has a right to expect that we will do all that an honest lawyer can to win his controversy. He has, however, no right to ask us to do more. If his suit cannot be won by honest endeavor, it should not be won at all. We have no right to overstate his case, we have no right to misstate his case, because we have no right to try to deceive the court. Nor is it true that the practice under consideration renders valuable service to our clients. A lawyer is not serving his client by advancing an argument based on a misconception of the testimony, — an argument which must crumble with the foundation upon which it rests. In that case he presents no argument for his client. He neglects his client's interests. He injures rather than benefits him. Indeed, I believe it may be said generally that a lawyer renders his client most efficient service when he serves him with an enlightened conscience. I think it may also be said that their lack of fair-mindedness explains why so many lawyers of the greatest ability fail to attain the highest place in our profession.

I think, too, that the judges constituting the court can do something to remedy this evil. If they can prove by their decisions that they are never misled by improper statements, they will do much to discourage it. There is no doubt that they are sometimes misled, and this circumstance affords the only adequate explanation for the fact that some lawyers of high rank persist in a reprehensible practice.

An attentive attitude on the part of judges will do much to encourage lawyers to make fair statements and proper arguments. Lawyers will hesitate to make erroneous statements to watchful, attentive, and trustful judges. When a lawyer sees that he is receiving the undivided attention of an intelligent, honest, fair-minded judge, he will endeavor to merit the confidence he is receiving. Such attention, it must be confessed, he does not always receive. It must be admitted that judges sometimes do not

closely attend to the arguments that are addressed to them. No one can justify this, but there is some excuse for it.

While most of the arguments addressed to a court afford aid in reaching a correct decision, it cannot be said that all of them do. Sometimes those arguments — so-called arguments — are mere aggregation of words, emanating from the mouth of a lawyer determined to use every minute of the time given him by the rules of the court. The judge who can sleep in the daytime is to be envied in such a case. He can escape what his wakeful and more unfortunate associate must endure. It is unnecessary to state that a judge is not attentive to such an argument. If you think he is, you are deceived. That, however, is a matter of little consequence, for nothing could be gained by such attention. The serious consequence is that such experiences are, if often repeated, almost certain to create a habit of inattention, — a habit that may persist when arguments should be listened to attentively. It is not true, as was once said by a waggish friend of mine, that he can always identify a member of a court of last resort by the vacant expression of his countenance. If, however, it were true, the experience I have described explains if it does not justify it. Of course we will all agree that the judges should correct their habit of inattention and do their utmost in every way to get a clear conception of the issue in controversy. They then reach the more important duty of declaring the law which controls that issue. They must bring to the discharge of this duty all the highest judicial qualities, — integrity, learning, wisdom, courage, industry, and, above all else, fair-mindedness. Their commission from the people authorizes them to declare the law applicable to the decision of the controversy, but it does not authorize them to declare law that is not applicable to that decision. If they do that, they usurp an authority that has never been given them. The successors of these judges, when called upon to decide a controversy in which the supposed principle is applicable, possess the undoubted and sole authority to determine its correctness. Moreover, without the aid afforded by the actual controversy, the court lacks one of the necessary elements to a correct determination of the controlling legal principle. For, by its application to an actual controversy, the justice of that principle can be tested. Though this test is not the only one which should be applied, it is one which can never be safely omitted. So it often happens that when judges state a legal principle inapplicable to the case under consideration, they state it incorrectly. It may be said that this mistake is not irremediable, because such a statement is not a precedent binding on the court; the court having entire liberty to repudiate it upon the ground that it is an *obiter dictum*. But I am persuaded that courts should take greater care than they do to guard against such mistakes. Even though they are subsequently corrected, their commission tends to weaken public confidence in the courts that committed them; and the consequence of such a mistake is sometimes disastrous. The reputation

of Chief Justice Taney, acquired by a long life of usefulness and fidelity, was almost destroyed by his decision in the celebrated Dred Scott case. It is true that the principles of that decision were detested by a majority of Americans and they believed them to be incorrect, but the reputation of this eminent jurist would not have seriously suffered had they not been persuaded that these principles were inapplicable to the controversy under consideration. Faith in him was lost because it was believed — I think erroneously believed — that he took advantage of his position to declare a law which he had no authority to declare.

The question arises, What is this law by which controversies are to be determined? Part of that law is in writing — commands made by the people themselves or by those to whom they have delegated authority to make laws. As to this part, it may be emphatically stated, the law applied by the court is the law made by the people. But this part is a very small part indeed of the law applied by the courts in determining controversies. Nearly all the law so applied is unwritten law. The written law, as has well been said, is only "the fringe upon the body of the law," and after its consideration we have not answered the question, What is the law by which controversies are determined?

Every lawyer should read and reread Mr. James C. Carter's excellent book, entitled "Law, Its Origin, Growth, and Functions." That book throws great light on the question, What is the law, and, at least, materially contributes to its correct answer. Whoever reads that book intelligently and diligently, though he may not entirely agree with Mr. Carter, will, I believe, be convinced that the law applied by the court in determining controversies is the same law which regulates human conduct. The ordinary individual in his everyday affairs regulates his conduct by the same law which the court applies in determining controversies. The man of affairs in deciding what course he will pursue to advance his own interest and at the same time to avoid injury to his neighbor, is engaged in the same process that the court is engaged in when it determines a controversy involving a similar question. Each is making a decision according to the law which regulates human conduct. What is the law which regulates human conduct? That is a question which I do not believe the wisest man in the world can correctly answer. That is the question the courts are constantly striving to answer, but which they have not yet answered. While we know some of the principles of this law, we do not know all of them, — perhaps we do not know its fundamental principle. We can say, however, that it is the law by which a people advance from the lowest and most degraded savagery to the highest civilization, — to a civilization higher and more splendid than to-day is dreamed of. Who made this law? Certainly the courts did not make it. No one ever consciously made it. "It is," says Mr. Carter, "the form in which human conduct — that is, human life — presents itself under the necessary operations of the causes which govern conduct." It is, I add, in the highest sense the people's law. Courts of last

resort alone possess official authority to declare this law. They possess that authority because the people have given it to them. They declare it, as has heretofore been stated, by applying it in deciding a controversy. This declaration is not the law, but it is considered the highest and best evidence of the law. We call it a precedent. It is considered the best evidence of the law because it is ascertained by the best method human ingenuity has been able to devise. If the law so declared is correctly declared, that is, if it really is a rule which regulates human conduct, the court of last resort has rendered a most beneficent service, for it is of the utmost importance that the people should know the law which regulates their conduct, — the law by which they advance toward a higher civilization. As by knowing the law of health people preserve and prolong their lives, so, by knowing the law which regulates their conduct, they make more certain and speedier progress toward their destined — their glorious — end.

This knowledge will contribute to our material, moral, and also, I believe, to our spiritual upliftment.

Heretofore I endeavored to emphasize the truth, that faith that courts will determine controversies according to law is the foundation of American government. I now emphasize a truth far more important. Upon this same faith must rest, in part at least, our hope of advancing toward a higher civilization, — our hope of making material, moral, and spiritual progress.

But what if courts do not determine controversies according to law? Suppose that instead of correctly declaring the law, they declare it incorrectly; suppose they make a mistake in declaring the rule which regulates human conduct, and that human conduct, instead of being regulated by the rule declared, is regulated by an opposing rule? Human conduct will, in that case, be regulated by its own law and not by the declaration of the court. And this decision must sooner or later — the sooner the better — be repudiated by the courts. Fortunately the court, by declaring an incorrect rule, does not materially retard human progress, because, as already said, our conduct will be regulated by its own law and not by the rule incorrectly declared. By declaring an incorrect rule the court merely misses an opportunity of advancing human progress. Judges sometimes take themselves too seriously. They fear they will change the law if they incorrectly declare it. Of course they should take every care to correctly declare it. But if a collision occurs between their declaration and the law, the law does not suffer; they suffer.

If any one can prove that the law declared in a judicial decision is not in harmony with human conduct, he should not keep silent. While it is the duty of every one to uphold the judge who decides a case according to law, it is equally the duty of every one to criticize a decision which is not according to law. But the extent or severity of this criticism does not afford the test of the correctness of the law so declared. That test

is afforded not by the voice of the people but by their conduct. The test is not whether the rule is popular or unpopular, but whether human conduct is in fact regulated by it. If, by acting in accordance with this rule, we advance toward a higher civilization, it is the law. That is the test. If it does not stand this test, it is not the law.

There are two sources from which courts of last resort get the law which controls conduct, — the law by which they determine controversies. One of these sources is (to quote from Mr. Carter), "a study of conduct and consequence," and by applying in this study principles of reasoning approved by the common judgment of mankind. This is the source from which individuals get the law by which they determine their conduct. When a judge gets his law from this source he is said to be deciding a case on principle, or according to the rule of common sense. The other source from which a court of last resort gets the law is from decisions made by itself or by other courts of last resort. When the law is taken from this source, a court is said to be deciding a case upon precedent. It is unsafe for a judge to neglect either of these sources.

The judge who deduces his law entirely from precedent — who, in other words, is a slave to precedent — is the most inefficient of judges. He will delay the decision of the most unimportant question until he finds a case in point. Having no vision of the fundamental principles of the law, he is almost certain to ridiculously misapply the precedent and thus reach a decision erroneous and often absurd.

On the other hand, the judge who never looks at authorities, who has — as he often says — a contempt for precedents, but who possesses a vigorous intelligence and sound understanding and decides all cases according to the rule of common sense, will decide the great majority of them correctly, but some of them he will decide incorrectly. He will decide the majority of these cases correctly because they are simple cases controlled by some principle of elementary law. He will decide others incorrectly because they are not simple and because they are controlled by a principle of law which can be discovered only by the aid of great wisdom and extraordinary powers of reasoning.

This wisdom and this power of reasoning were possessed by many of the great judges and used by them in making their decisions. The judge who decides difficult cases without examining these decisions refuses to look at the light. He refuses to get his law from the best source. By implication he asserts his superiority to all these great judges who have gone before him. He would be convinced, if he studied their decisions, that their united wisdom exceeded his.

The truth is, that to decide the law with even approximate accuracy, a judge must be neither a slave nor an enemy of precedent. He must be a master of precedent, and he must also be a diligent student of human conduct and its consequences, possessing a logical mind, able to reason correctly.

The decisions of courts of last resort must, at least, according to our American notions, be in written form. This is done for the double purpose of insuring accuracy — for writing is a great aid to exactness — and also that the world may know the rule of law declared and applied. Extraordinary care should be used in the preparation of these opinions. They should contain a statement of the facts essential to a clear understanding of the issue involved. Every other fact should be omitted. They should contain a clear statement of the rule of law applied to the controversy, and they should contain nothing else.

It is a mistake to attempt to discuss every proposition urged by counsel; if the proposition is manifestly frivolous, if it is based upon an erroneous conception of the record, or if it is answered by elementary principles of law, the opinion is disfigured by its consideration. Its discussion tends to conceal other and possibly important principles decided. Opinions should be appropriate to the case. If there is involved no important principle, no opportunity is presented for a great opinion, and judges make a great mistake if they attempt to write one. My limited experience as a member of a court of last resort convinces me that the great majority of cases present no important question. Many of them are chancery cases where the controlling issue depends upon the credibility of witnesses. In such cases I think the court does its full duty when it contents itself with the statement that it gives credit to certain testimony. I think it is a mistake to undertake to state why that credit is given. In many cases the only issue presented is determined by a construction of the record. In those cases all that the opinion can do is to state its proper construction. Many other cases are determined by the application of principles of elementary law, about which there is not the slightest question. I doubt if it is wise to publish any of these opinions in the report.

Courts should not be unduly solicitous to write opinions that will be convincing. Arguments designed to convince are often selected from considerations of a temporary and transitory nature. They are out of place in a record designed to be permanent. And though these arguments silence adverse criticism and make the opinion popular, they have little tendency to establish its correctness. Its correctness, as I have heretofore endeavored to prove, is to be tested by its application to human conduct.

Seldom is the judge of a court of last resort given the opportunity to write a great opinion. This is most fortunate. That opportunity may come, however, and if it comes, it comes unheralded. It may be found that in some meager record, poorly briefed, there is presented for decision an issue which requires the declaration and application of a rule of law never before discovered. It may be in a case which must be decided without precedent; it may be in a case which must be decided in opposition to all precedent. No judge should crave such a task; no judge should

shrink from the responsibility of performing it. If it comes, he should pray that he may be equal to his opportunity; that he may contribute to the advancement of humanity by correctly declaring the law.

THE PRACTICAL WORKING OF THE APPEAL SYSTEM[1]

By Henry T. Lummus

The traditional function of the criminal courts is to punish infractions of the criminal law, not much, if at all, as a measure of retribution to the offender for his sins, but rather as an example and a warning to deter the particular criminal and other possible criminals from similar offenses. It is generally conceded that the good effect of punishment is measured by its speed and certainty, not by its severity. While a remote or merely possible punishment has little deterrent effect, few persons, unless professional criminals, indulge in crime where there is a practical certainty of a moderate but speedy punishment upon detection. The law should act as speedily as is consistent with a fair preparation and trial.

Perhaps the foregoing statement of the purposes of criminal justice requires modification, in view of the modern use of suspended sentences and probation. The interests of the individual defendant and his family are not to be forgotten in the desire to make an example to the community. An opportunity for reformation without punishment may convert a possible public charge into a good citizen. In many cases immediate punishment would involve a hardship upon the defendant or his family, out of proportion to its value as a deterrent to him or to others. In such a situation the case may be filed, or the defendant may be placed on probation, with or without a requirement that he pay a fine during the probation period, or a sentence may be imposed and its execution suspended on condition that the defendant shall be of good behavior. But it is essential to the efficacy of such lenient measures that the action of the law be especially swift and certain in case the defendant construes leniency as weakness and shows his contempt for the law by further violations of it. The necessity of promptness, certainty, and finality in our criminal practice is increased, rather than diminished, by the growing use of probation. Unless there lies behind probation the power of the law, ready to vindicate its authority by speedy, certain, and final action in the court that granted the leniency, the probation system rapidly degenerates into a feeble sentimentalism.

The lower courts are expected to perform two duties in the administration of criminal law. Their first duty is to conduct the preliminary investigation in cases of murder, robbery, and other serious crimes

[1] From a pamphlet on "The Failure of the Appeal System," published by the Massachusetts Prison Association, 1909.

beyond their jurisdiction, to determine whether there is probable cause to hold the defendants to await the action of the grand jury, and to fix the bail when probable cause is found. That function they are able to perform with general satisfaction.

Their second duty is to relieve the superior court of the trial of the less important, but still important, criminal cases, leaving to the superior court the weightier affairs that are fully enough to occupy the undivided attention of that court. In the exercise of that function the lower courts are supposed to have great influence in the community, and by their action to produce order and inspire respect for law. The right of appeal, in theory, exists for the purpose of giving relief in those exceptional cases in which the defendant is convinced that the lower court has erred; and in such exceptional cases the superior court is supposed speedily to reconsider the case and to render the judgment that the lower court ought to have rendered.

It certainly is true that the lower courts come into closer and more frequent contact with the mass of the people than do the higher courts; and if the purpose of the criminal and civil laws is to be brought home to the mass of the people in such a way as to teach the great lessons of respect for law and obedience to law that are essential to the welfare of the state, it must be done in the lower courts. We have at the present time, especially in our manufacturing cities and towns, not only our English-speaking population, with its lawless element, but also a vast army of foreigners, many of them industrious and law-abiding, but containing among them some of the scum of Europe and Asia. The lawless element know of the superior court as the tribunal to which their associates fly for refuge when sentenced in the lower court; some of them may have been to the superior court on appeal, with more or less success. But the tribunal whose doings they actually see and hear about every day, whose deeds are chronicled in the local newspapers and form the subject of daily gossip, is the local lower court. To the mass of people the administration of the law in the lower courts typifies the administration of the law in general. The only glimpse of the judicial power of the state that they commonly get is the one they get in their own community through the action of their own lower court. If that glimpse shows the judicial power to be feeble, slow, uncertain, and liable to be halted and rendered impotent at the will of any person interested, it is not surprising that many people find it hard to believe that the state has anywhere any efficient force for compelling the performance of public or private duty, or that the mandates of the public, acting through the legislature, are entitled to any respect or obedience.

It is easy to see that the lower courts might be powerful agencies for law and order. The President-elect in a recent speech has called attention to the public importance of the courts having jurisdiction over small cases, both criminal and civil, and to the necessity of taking measures

to induce lawyers of real judicial ability to preside over such tribunals.[1] But the question is open in Massachusetts, whether under the present system the lower courts can possibly perform the duties for which they were intended, or fill the place in the judicial system that they are commonly supposed to occupy.

The number of criminal appeals from the lower courts is very great.[2] The appeal must be taken, under the law, when the sentence is pronounced, and unless the sentence is a small fine the defendant naturally seizes the opportunity to make void the action of the court, hoping that some chance in the higher court may turn out to his advantage. If he had to select his tribunal before trial, he might prefer to be tried or sentenced by the lower court rather than by a jury or by any other court; but having the right to appeal after knowledge of the adverse decision, — and it makes no difference how correct and just that decision was, or that the defendant pleaded guilty, — he naturally avails himself of it. Even though he were certain ultimately to pay the penalty, he would nevertheless appeal from any considerable sentence of imprisonment, merely to put off the evil day, just as defendants sentenced in the superior court regularly went up on frivolous and hopeless bills of exceptions until St. 1895, Chapter 469 (R. L., Chapter 220, Section 3), put a stop to that practice by providing for the execution of sentences notwithstanding exceptions. By that statute the legislature put an end to a great evil, which, however, caused nothing worse than delay; the system of appeals from lower courts, which still remains, contains what seem to be much greater evils.

The history of the ordinary appeal case shows the defects in the present system. The case is not tried in the lower court until the defendant is ready and has his case fully prepared. Upon a full trial before the judge in the lower court the defendant requires the judge to apply the doctrine as to the burden of proof in criminal cases, and to discharge the defendant if there is any reasonable doubt. If the judge fails to find the defendant guilty, the defendant can never be prosecuted again, even though the decision is grossly erroneous. If, however, the defendant is convicted, he then seeks to have the judge place the case on file, or put him on probation, or, at the worst, impose a small fine. If probation or filing is the result, the defendant may not immediately appeal, although if placed on probation he may violate every condition of his probation and then appeal whenever it is sought to sentence him for such violation; and if the case is filed, the defendant may commit every known kind of

[1] See *Green Bag*, September, 1908.

[2] The volume and increase of the appeal business in the superior court is shown by the following table of criminal cases in that court for the commonwealth.

	Indictment Cases	Appeal Cases
Year ending October 1, 1906 . . .	2550	4913
Year ending October 1, 1907 . . .	2649	5034
Year ending October 1, 1908 . . .	3371	6237

misconduct, and yet the lower court cannot take the case from the files and impose any effectual punishment. Whatever the judge does, however, the government cannot appeal. He may refuse to punish the most flagrant offense within his jurisdiction, and the public have no rights; but he cannot impose a fine of one cent upon a self-confessed criminal without the liability to an appeal. He is deemed worthy to be trusted with all the rights of the public, but with none of the rights of the defendant.

If the lower court imposes a penalty upon the defendant, the defendant then appeals and gives bail. If all the criminal cases, original and appellate, in the superior court were to be tried, the number of justices would have to be increased in order to give the district attorneys adequate time to dispose of the mass of criminal business in that court. Even if a district attorney is proof against political and personal pressure, he has to recognize the necessity of getting through with his business. A criminal case that has to be continued for one term is likely to be lost when the next lot of new cases comes up; a second continuance is equivalent to an acquittal. The cases coming from the lower courts on appeal, though important to the peace and good order of the community, are overshadowed by the murders, robberies, burglaries, and other cases begun by indictment; and naturally the appeal cases are the ones that have to be disposed of, if possible, without taking time for trial. Many of them are nol-prossed, or continued, or left on the docket without action, or a plea of guilty is taken and by agreement the minimum penalty is imposed. If, however, the district attorney insists upon a real and effective punishment, the defendant makes his fourth attempt to escape by means of a verdict of the jury. He has already had a full trial in the lower court, but he now asks a second tribunal, the jury, to acquit him if it can find any reasonable doubt of his guilt. Sometimes a defendant found not guilty in the lower court of one of two inconsistent charges, in a doubtful case, secures his acquittal on the other charge in the superior court by showing that he was really guilty of the charge upon which he was found not guilty below. If he is convicted by the jury, he appeals no further on the facts, not because he is any better pleased with his trial in the superior court than he was with his trial below, but simply because the law does not give him another appeal. But he has one more chance, to say nothing of the possibility of exceptions. Despite the fact that the lower court has already sifted its cases and placed many of them on file or on probation, the defendant now asks the superior court to sift again the cases that have come up on appeal, and to file his case, or put him on probation, or, at the worst, to impose some small penalty.

The system of appeals reminds one of the habit of small boys, who, after trying some dispute by the toss of a coin, and losing the toss, cry "Twice out of three!" But that simile does not tell the whole story. The system is more like one of those marble games, consisting of an

inclined plane with five holes, in that the government's case may drop out at any of the five holes, and can reach the goal of sentence and punishment only by great good fortune at every hole.

Is it any wonder that lawyers tell their clients, after an adverse decision or sentence in the lower court, that the sentence of the lower court is of no consequence, but that everything will be made right by an appeal? Is it any wonder that appeals increase, and that no one accepts a sentence of imprisonment in the lower court if he can get bail? There is a common idea that a poor man must accept the sentence of the lower court because he cannot get bail; though it would be a strange argument for the appeal system that it compels the poor to suffer penalties that the well-to-do can escape at will. But experience shows that comparatively few appeals are prevented by the inability of the defendant to procure bail. Where the defendant has family or other associations in the locality, the theory of bail requires that the amount should not be very large; and it is a very destitute and unfortunate man who, with the aid of his friends and professional bondsmen, and with the fee system prevailing among bailing magistrates, cannot obtain the moderate bail required in appeal cases. Some unlucky human derelict, drifting from place to place, or some common drunkard without money or friends, may accept a sentence to jail or to the state farm, imposed more as a kindness than as a punishment; but a sentence of imprisonment, or even of a considerable fine, for a real offense against the peace and order of the community is usually annulled by a prompt appeal. The main result of the constant extension of the jurisdiction of the lower courts is that they pretend to deal with a greater variety of matters. The only way in which the lower courts can reduce the number of appeals is by constant and outrageous error in favor of criminals.

Any one who supposes that this weakness of the lower courts is not known to the criminal classes, even to the merely disorderly amateurs in crime, very much underestimates their intelligence. If the decisions and sentences of the lower courts cannot be placed upon any firmer footing, it would seem much better to take away altogether their power to decide and sentence, and make them merely holding magistrates, to bind defendants over to some court deemed competent to determine the case. The spectacle of a solemn trial, ending in a conviction and sentence, turned into a mockery, not because of any error in the proceedings, but merely because a party arbitrarily chooses not to abide by the result, is what brings the lower courts and their authority into contempt, and breeds a contempt for law in general.

I would not be understood as arguing that a defendant in a criminal case, or a party in any case, should be deprived of the right to a jury trial if he wishes it. But in many criminal cases the defendant would as willingly try his case before a judge as before a jury; in some cases a judge would protect his legal rights much more carefully and technically

than any jury. If the defendant wishes a jury trial, he ought to have it, either in the court of first instance or in a higher court. But if he sees fit to go to trial on the merits before a court without a jury, he ought, it seems, to abide by the result, unless that result was arrived at by some error of law. I am convinced that if there could be but one trial of a criminal case, and that a speedy and final one, the penalties now commonly imposed could be reduced considerably without any injurious effect upon the peace and order of the community. There seems to be no reason why a man should have two trials and more than two chances in two courts in a case of simple assault, even where he pleads guilty and the sentence is a small fine, while he may be imprisoned for thirty years for rape or robbery by a single justice of the superior court after one trial.

The appeal system in civil cases, though to my mind not such a crying evil as in criminal cases, is nevertheless in great need of reform, for much the same reasons. Among lawyers, however, the need of reform in civil cases is more commonly recognized, for the obvious reason that in civil cases the appeal system often injures their clients directly, while in criminal cases it often aids their clients and injures only the unrepresented and unprotected public. For forty years, at least, the need of speedy and final determination of small civil cases has been recognized, and various futile expedients have been tried to secure it. For example, see St. 1852, Chapter 314; St. 1870, Chapter 201, Section 7; R. L., Chapter 160, Section 42; Chapter 203, Section 3; Chapter 157, Section 25. Article XI of the Massachusetts Declaration of Rights says, "Every subject of the commonwealth . . . ought to obtain right and justice . . . promptly and without delay." However accustomed we may be to the past or present delays in our legal procedure, it must be considered that any delay in the settlement of civil controversies and the enforcement of civil obligations, beyond a fair time for preparation and trial, is not only a denial of the rights guaranteed by the constitution, but also a practical injustice leading to disrespect for civil obligations and for the law itself. Many eminent authorities consider that prompt hearings with speedy and final decisions, even though occasionally wrong, produce better justice on the whole than slow and wearisome appeals and delays, even though the final decisions be those of an Eldon.

The number of civil appeals is very large.[1] Of course there are a good many judgments obtained by default and many of these are not appealed from; but in general these are in cases where the defendant is worthless, and the plaintiff is wasting his money in pursuing him. There are also poor-debtor proceedings and cases of equitable process, to collect a judgment already obtained in any one of the courts of the state,

[1] From October 15, 1903, to October 15, 1904, out of 1851 civil cases actually tried in the municipal court of the city of Boston, 815, or more than 44 per cent, went up on appeal, — an average of 68 per month, to say nothing of cases defaulted at the trial and appealed.

and in such proceedings no appeal lies. In a few cases the plaintiff or the defendant may be convinced that he has no case, and may be satisfied to abandon or settle the action. But a defendant who finds he has no defense often appeals for spite or other reason, and claims a jury trial in the superior court, merely to delay the final judgment for one or two or three years, as he may do in the present state of the dockets of the superior court. Coming now to the cases where there is a real controversy, it is only in the very smallest cases that the decision of the lower court is suffered to remain in force, and the theoretical jurisdiction of the lower courts up to one thousand dollars dwindles in practice to something nearer ten dollars. Appeals in ten-dollar cases, even, are not uncommon. The number of appeals does not seem to bear any relation to the confidence that the bar have in the court. The judge may be one to whom the bar commonly refer superior-court cases involving thousands of dollars as master or referee, with practically final authority; but when the judge sits in the lower court, the losing party appeals just the same, not because he believes that he has not had a fair trial, but because the law gives him another chance. In controverted cases the trial in the lower court is only a dress rehearsal, resulting merely in the disclosure of the exact evidence,—a result which, in the law of interrogatories, is deemed to be against public policy, as tending to create perjury at a subsequent trial (R. L., Chapter 173, Section 63; Wigram, Discovery, 1st Am. ed., 263). Apart from that result, the trial in the lower court, and the consideration and determination of the case by that court, is simply so much wasted time and energy on the part of every one. A poor man, who, after a full trial, has succeeded in winning his case in the lower court, and who can ill afford the expense of witnesses and counsel for another trial, can hardly be blamed for considering it the "wrong" of appeal rather than the "right" of appeal, when he finds his victory made fruitless, not for any error in the decision, but merely at the whim of his opponent.[1]

In the early days when the appeal system was created there were some reasons for permitting decisions of justices of the peace to be made void at the will of either party, that do not exist under our present system of lower courts; but the inertia of conservatism has hitherto prevented a change in the law. In the early days the time of magistrates, lawyers, parties, and witnesses was not very valuable. The higher courts were not then overcrowded with the mass of business that the complexity of modern life has since developed. Until St. 1857, Chapter 267 (R. L., Chapter

[1] Many people who give the subject hasty consideration regard the system of appeals, by which a suit can be brought in a justice-of-the-peace court and carried through the other courts to the supreme court, as the acme of human wisdom. . . . In truth, there is nothing which is so detrimental to the interests of the poor man as the right which, if given to him, must be given to the other and wealthier party, of carrying the litigation to the court of last resort, which generally means two, three, and four years of litigation. . . . Every change of procedure that limits the right of appeal works for the benefit, in the end, of the poor litigant. — Hon. W. H. Taft, in *Green Bag*, September, 1908.

173, Sections 56–74) the idea of a final trial of fact without a jury in a common-law action in any court was unknown, and the appeal system was considered a constitutional necessity. Most of the justices of the peace and some of the former justices of the lower courts were not lawyers, did not know any law, and were not expected to. But these conditions have changed. The justices of the peace, paid by fees, have been almost entirely supplanted by an elaborate system of police, district, and municipal courts; and unless the decisions of these courts are to be given some effect in determining litigation, the considerable sums paid by the counties for their maintenance are, in great part, wasted money. If a man is fitted to exercise judicial functions at all, he is fitted to exercise a larger measure of them than is permitted to a justice of a lower court under the present law. If the lower courts, in general, are deemed unworthy of any more effective jurisdiction, that affords an incontrovertible argument for their immediate reconstruction, but no argument at all for the continuance of the appeal system. The fact is, I believe, that all the justices of the lower courts at the present time are trained lawyers, and many of them are lawyers of recognized ability and high standing. It would surely tend still further to improve the lower courts, if presiding in them were made a real exercise of the judicial function, instead of a likely or even probable waste of time; and this would be especially true if provision were made for exceptions, so that a justice of a lower court would act under the stimulus of responsibility for his rulings in matters of law.

For the law to permit a party to have a complete trial in a small case in the lower court, and then at will to wipe out the result and have a second complete trial in another court before a jury,— to say nothing of the fact that the second trial may take place before a single judge without a jury,— seems just as wasteful and absurd as to permit an appeal in a larger case from a justice of the superior court to a jury. If there were any sound policy in having two trials of the same case, one would expect to find two trials possible in the most important and intricate cases. Instead of that, a party to a controversy involving a hundred thousand dollars must stake his rights upon the result of a single trial, perhaps before a single judge; but he has the fortune or misfortune, as the case may be, to get into the ponderous and costly machinery of an appeal and two trials, at the public expense, if his case happens to involve a ten-dollar grocery bill. Now that the superior court is overcrowded with important cases, and its work is two or three years behind, it seems a waste of public money, and an abuse of the rights of parties and of the public, not to let the lower courts do the work for which they are intended.

POLITICS AND THE JUDICIARY[1]

By William R. Smith

Justice cannot be administered with perfection so long as human nature is imperfect. The system adopted in arriving at a just conclusion when personal or property rights are involved in a proceeding before our courts has been built up after many centuries, and improved with the added experience of lawyers, legislators, and judges who, from year to year, have noted and corrected deficiencies and imperfections in the processes employed for the enforcement of rights and the redress of wrongs. We, at this time, no less than those who have preceded, are employed in the same work, to the end that truth may be discovered and not suppressed. The efforts of any man who expects to contribute anything to the establishment of justice must be devoted to the sole object of securing more efficient ways and means of determining the very truth of the case. Courts exist and lawyers strive that the light of truth may illuminate the path of justice; that falsehood may be revealed, and error avoided.

Since we can only approximate to an exact ascertainment of legal rights, owing to the fallibility of human nature, it is incumbent on us to reduce to the lowest degree those instances where justice fails.

The judges of the country are drawn from the members of the bar. The lawyer drifts easily into politics from the fact that his training fits him to consider and discuss public questions, and laymen, in large part, are influenced greatly by his judgment expressed in matters pertaining to the public welfare, especially when it is affected by legislative enactments or the decisions of courts.

I am not one of those who look with a sort of superstitious awe on an occupant of the bench. I have never thought that the step from the plane where lawyers stand to the altitude where judges sit, adds one cubit to the intellectual stature of the man or *ipso facto* increases his knowledge of the law. If he has partisan prejudices as a lawyer, their sharp and cutting corners may be worn off to some extent by long judicial service, but their identity is never wholly obliterated. As the twig is bent at the bar, the tree is apt to be inclined on the bench.

In the trial of political causes the honest judge will strive to shake off party bias and view the controversy from a purely nonpartisan standpoint. When a conclusion is reached he gives judgment with a satisfied conscience, convinced in his own mind that the result came by an adherence to strict rules of law only, uninfluenced by any predilection favorable to the party to which he belongs, or prejudices against that party whose principles he combated while at the bar. If such abnegation existed in fact, the ideal would be reached.

The frailty of human nature, however, is a factor in the administration

[1] President's annual address before the Bar Association of Kansas, 1905.

of justice which many persons do not appreciate in their reverent respect for the courts. The lawyer who deals constantly with human passions, prejudices, and ambitions knows that the judgment of men is influenced and warped (unconsciously often) by their surroundings as well as by their successes and defeats in the battle of life.

To reduce to a minimum a possible miscarriage of justice in cases where political rights of parties are involved, I shall make some suggestions which may be impracticable, but if they shall tend to render the slightest service in the direction mentioned, I shall feel amply repaid for my feeble efforts in that behalf.

It must be remembered that when lawsuits of a political nature come before the courts, in a great majority of cases they affect the ambitions of men in their aspirations for political preferment. Monetary considerations arising from the compensation of the office are of secondary importance. A judgment may take from a man his farm with less disappointment to him than the failure to get an office which pays no more in a year than the annual rental of the land he has lost. Back of the candidate stand his adherents, who can see no equity in the claims of his opponent. An intense feeling of hostility arises between the parties, which is manifest in every stage of the proceedings. If the litigants are of opposite parties, a decision resulting in the success of the one whose political faith accords with those of the judge, or with a majority of the court having several members, is received by the defeated party with a feeling that the pure principles of right have not been applied with that judicial indifference to results with which the courts determine ordinary questions of contract or of tort.

That the great Chief Justice Marshall was subject to early political environment, in his professional and political life, affecting his views on great constitutional questions, it would be irreverent for any of us to assert. In a life of the distinguished jurist, found in the American Statesmen Series, the writer says:

> He made Federalist law in nine cases out of ten, and made it in strong, stately fashion. A Republican judge, however, would have brought about a very different result, which, as we believe, would have been vastly less serviceable to the people, but of which the workmanship, in a strictly professional and technical view, might have been equally correct.

Judges can never be convinced that they are not open-minded, colorless, and without influencing impressions when political controversies arise for determination. It must be conceded that in comparison with laymen they are infinitely less subject to partisan prejudices, because legal and judicial training induces conservatism and a disposition to hear both sides of a question before reaching a conclusion. It is the element of unconscious bias, however, with which we must reckon, for it is ever present and steals upon the judgment unawares.

In the late case of Commonwealth *vs.* Caleb Powers, convicted of participation in the killing of Governor Goebel, in which, for the third time, a conviction of murder in the first degree was set aside by the Kentucky court of appeals, the highest tribunal in that state, Mr. Justice Barker uses the following forcible language:

> The administration of even-handed justice has no more insidious enemy than political prejudice; it enters unseen and unsuspected into the human mind, corrodes the reason, and undermines the judgment; neither purity of heart nor exaltation of character affords an antidote for this deadly poison; indeed, these virtues may well magnify the evil, for the mind thus possessed is all the more ready to enforce the oblique judgment when it has no cause to suspect its own integrity.

Richard Harris, K.C., an eminent English barrister, in a note to the "Reminiscences of Sir Henry Hawkins," which he edited, says: "I have studied judges all my professional life, and am certain that the less religious or political sentiment imparted to the bench, the better it is for the interests of justice."

It is the suspicion of partisan bias more than its actual existence which tends to affect public confidence in the courts. In this republic a tribunal engaged in the administration of justice must both merit and possess the faith of the people to sustain it in power and respect. I do not mean by this that public clamor should have the slightest effect on judicial actions, for courts often accomplish their best work in protecting the people against themselves.

Under our Australian-ballot system the number of political cases has been many times increased. The later reports are full of decisions respecting the preparation and counting of ballots and the rights of candidates to have their names go before the voters. The supreme court and district courts also in this state are appealed to before every general election to decide controversies arising under the ballot law in which candidates for office are interested. Contests after election are not infrequent, often presenting difficult questions of fact whether an elector intended to vote for one man or another. These cases are important because they affect the integrity of the elective system, the freedom of the voter in casting a secret ballot, and government by the majority, which is the foundation of our political system.

I am not making an argument in favor of the disfranchisement of judges, nor do I complain of their participation in party affairs to the extent of expressing their political sentiments at the polls. Beyond this the individual judge must decide for himself how far he should go. I am convinced, however, that most of them — in fact, a very large majority — endeavor to avoid suspicion of partisanship by a modest exercise of their political rights, free from criticism of men and measures of opposing parties, and without any unseemly display of enthusiasm in defense of their own.

It is gratifying to be able to say that within my recollection of the personnel of the supreme court of Kansas, extending back for thirty years, none of its members, with possibly one exception, and of that I am not sure, has ever taken part in political campaigns by making party speeches or been conspicuous in support of the principles of the party to which he belonged.

As we cannot hope to secure a judiciary wholly indifferent politically, would it not increase and maintain public faith in the courts if both of the great parties were represented on the bench? Does the supreme court of Arkansas administer justice better because its judges are all Democrats, or the supreme court of Kansas more accurately apply the law because its members are all Republicans? What lawyer inquires or cares whether a Republican or Democrat wrote "Greenleaf on Evidence" or "Parsons on Contracts"? What judge takes thought of the political belief of a lawyer who is making a convincing argument at the bar?

Why exalt politics over religion in determining judicial qualifications? We choose a fanatical Baptist for the bench without question because he belongs to our party, and defeat a fanatical Democrat because he does n't. Is one better than the other?

In the state of New York since 1884 the bar, supported by the people, have succeeded in making political creed an indifferent consideration in the choice of judges for the highest judicial tribunal, namely the court of appeals. In 1884 the terms of office of Judge Rapalo, a Democrat, and Judge Andrews, a Republican, expired. The Republican and Democratic state committees agreed that both should be nominated, which was done, and both elected by a nearly unanimous vote. In 1892 both political parties nominated Judge Andrews for chief judge and he was elected without opposition. In 1895 the constitution was amended, and it was provided that whenever the judges of the court of appeals certified to the necessity, the governor should designate not exceeding four justices of the supreme court to sit in the court of appeals until the number of pending cases was reduced to one hundred and fifty, with the provision that no more than seven judges should sit in any one case. Governor Roosevelt designated two Republicans and one Democrat.

In 1902 the term of Judge Gray, a Democrat, expired. The Democrats nominated him for reëlection, and the Republicans chose Judge Wernor to oppose him. There was a strong feeling among members of the bar that Judge Gray, having served acceptably for fifteen years, should not be defeated for political reasons. The election resulted in the election of Judge Gray by about ten thousand plurality, while Governor Odell, a Republican, was elected by about the same majority.

In 1904, when Chief Judge Alton B. Parker resigned, after his nomination for President, the leading Republicans of the state thought it would be unfair to take advantage of the occasion to put a member of their party at the head of the court of appeals. Judge Cullen, a Democrat,

who had served acceptably on the supreme bench and in the court of appeals, was first nominated by the Republicans and then by the Democrats for the office of chief judge, and elected without opposition by an almost unanimous vote. At the same time Judge Wernor, a Republican, was nominated for the court of appeals by both parties, and elected without opposition.

Supreme-court judges have been elected generally in New York for political reasons. In 1884, however, in the seventh judicial district with an overwhelming Republican majority, two Democrats were elected against the Republican nominees. In 1902, in the fifth district, the Republican attorney-general, who was the regular nominee of his party for supreme justice, was beaten by about ten thousand majority when the district, at the same time, had that much Republican majority. During the administration of Governor Hill, he on several occasions appointed Republicans in Republican districts to fill vacancies, who were afterwards elected at the polls.

In 1895, when Governor Morton was called on to designate justices of the supreme court to sit in the appellate division in the second department, he made the court Democratic by selecting four old, experienced Democratic justices. In 1902 Governor Odell, when he had the opportunity, refused to make the appellate division of the supreme court, with all its patronage, Republican. He refused to "turn down" the presiding justice who had held the office for many years.

In Maine the supreme court consists of eight justices. It has been the practice for many years past to have one Democrat on the bench.

In New Jersey the judges are appointed by the governor with the concurrence of the Senate. In the higher courts the term of office is seven years. As the politics of New Jersey vibrated forty to sixty years ago from one party to the other, both parties had a representation in the higher courts. From 1869 to 1895 the governors were all Democrats. About thirty years ago the Democratic governors began to appoint Republicans to the supreme court, and for many years three of the nine judges were Republicans. In later years, when the Republicans had a majority in the Senate, the Republican representation in the supreme court was increased to four. Since the Republicans have been in power it has been the uniform practice to keep the court five to four in favor of the Republicans. This proportion will be continued probably indefinitely. Judge Depue, a Republican, was reappointed four times by a Democratic governor. The chancellor of New Jersey has always belonged to the same party as the governor who appointed him. The chancellor has the appointment of the vice chancellors, and generally they have been of both political parties.

In Pennsylvania there was much partisanship shown in the election of judges until the new constitution of 1874. In that constitution it was provided that when two judges were to be elected to the supreme court,

no elector should vote for more than one justice. This constitution increased the number of judges by two, and so a Democrat and Republican were elected. In 1888, when the conventions of the two political parties met, there was a vacancy to be filled in the office of justice of the supreme court, by the expiration of the term of office of one of its members. Both parties made nominations. There was no prospect or expectation that a Democrat would be elected, but before the election a justice of the supreme court died, within time to have the vacancy filled by election, so both the Democratic and Republican nominees were elected. In 1899, by reason of death, there was a Democrat and a Republican elected at the same election. In 1904 the governor of Pennsylvania appointed a Democrat to fill the vacancy caused by the death of the chief justice of the supreme court.

The supreme court of Pennsylvania is now composed of six Republican justices and one Democratic justice. Whenever it shall happen by death or resignation hereafter that two justices are to be elected, the minority can elect one member of the court.

In Delaware the judges and chancellor are appointed by the governor for life. Formerly they were of the same political party as the governor, but in 1897, when the new constitution was adopted, a Democratic governor made the superior court to consist of three Democrats and two Republicans.

In New Hampshire the supreme court was increased to seven members in 1877, with the understanding that one of the justices appointed should be a Democrat, which was done. When the Republican chief justice died in 1898, the Republicans complimented a Democratic justice who had held office since 1877 by appointing him chief justice. He held the office only about eighty days, when he reached the constitutional age of retirement (seventy years). The governor then appointed another Democrat as chief justice.

In 1901 the legislature proposed to change the judiciary system for the purpose of having an independent supreme court whose judges should not try cases in the first instance. It therefore created two new courts: a supreme court consisting of a chief justice and four associates, which court was to have appellate jurisdiction only; and a superior court (a court of original jurisdiction) with the same number of justices as the supreme court. On the passage of this law the Republican governor reappointed the Democratic chief justice to be chief justice of the new supreme court. He also appointed as associates one Republican and one Democratic member of the old supreme court and two new men who were Republicans. For the superior court he appointed the four remaining justices of the old supreme court and one prominent Democratic politician. We thus see that from 1877 to 1901 the supreme court of New Hampshire consisted of four Republicans and three Democrats. Since April, 1901, the supreme court has consisted of three

Republicans and two Democrats, and the superior court also consists of three Republicans and two Democrats. In making all appointments this composition of the two courts has been preserved. It may be remarked that in New Hampshire all judges, by the constitution, hold office for life or until seventy years of age. In Vermont the judges, generally speaking, have belonged to the dominant political party. They are now chosen biennially by the legislature. There are a few exceptions to this, however. Isaac S. Redfield, a Democrat, was elected chief justice or assistant judge for twenty-five years, from 1835 to 1860. At his last election there was but one vote against him. He is said to have declared that if there was one member of the Vermont legislature who thought he was unfit for the office of chief justice, he did not wish to be chief justice any longer. Of late years the court has been unanimously Republican.

In Indiana the party that has carried the state has always elected the justice of the supreme court of that party. In 1893, when a Democratic legislature created an appellate court of five members, the Republican governor appointed two Democrats as members of this court. For the last eight years the supreme court and the appellate court have been unanimously Republican.

In the early history of Illinois judges were appointed by the governor and belonged to his party. In 1842 the legislature abolished the supreme court, and a new court composed entirely of Democrats was appointed. The constitution of 1848 created a supreme court composed of three justices, to be elected by districts. The Democrats controlled the court unanimously until 1864, when Judge Lawrence, a Republican, was elected. The new constitution of 1870 increased the court to seven members. At the election held for judges under this constitution two Republicans were elected. The court consisted of four Democrats and three Republicans. In the Chicago district, which was Republican, the Republican president of the constitutional convention was defeated by a Democrat as judge of the supreme court. Although the Republicans had elected the governor of the state for thirty-six years, during nearly all that time the Democrats had a majority of the justices of the supreme court. In 1888, however, the Republicans obtained a majority.

In 1873 the Chicago newspapers defeated Judge Lawrence for reëlection because he had fined a Chicago newspaper publisher for contempt for criticizing the court for delay in trying Chicago murder cases pending before it. Judge Lawrence's successor, a Democrat, was twice reëlected in a strongly Republican district. The Republican member from the Chicago district was reëlected without opposition. The court now consists of four Republicans and three Democrats.

Up to 1877 the supreme court of Wisconsin was elected on party lines. In 1874, at the time of the railroad excitement, Edward G. Ryan was elected chief justice. He was a very able man and a strong Democrat. He defeated Chief Justice Luther S. Dixon, who had then been

justice fifteen years and was regarded as one of the ablest judges in the West. In 1877 a constitutional amendment was adopted increasing the number of justices from three to five. In the election in April, 1878, David Taylor, a Republican, and Harlow S. Orton, a Democrat, were elected as the new justices. This seems to have been agreed on by both parties. On the death of Chief Justice Ryan in 1880 a Republican was elected. In April, 1891, David Taylor died and the Democratic governor appointed John B. Winslow, a Democrat, to fill the vacancy. He was elected by the people, and in 1895 was reëlected by a majority of nine thousand over his Republican opponent. In 1893 Silas U. Pinney was appointed by a Democratic governor to fill a vacancy. This made the court consist of three Democrats and two Republicans. On the death of Chief Justice Orton in 1895 the governor appointed Roujet D. Martin, a Republican, to fill the vacancy. Then the court consisted of three Republicans and two Democrats. Justice Pinney resigned in 1898, and a Republican governor appointed Joshua E. Dodge to fill the vacancy. Dodge was a Democrat and was elected by the people. Since 1895 the court has consisted of three Republicans and two Democrats. The practice seems now to be fixed and settled that the majority party shall have three members of the court, the other two being conceded to the minority.

Although Minnesota is a Republican state, the Democrats for the last twelve or fifteen years have had one or more members in the court.

In the Southern States the supreme courts are composed of Democrats. There is one Republican member of the highest court in each of the states of Maryland, North Carolina, Kentucky, and Missouri.

In a letter written recently by a lawyer in Davenport, Iowa, he states the method adopted in one of the judicial districts of that state for the selection of judges. It is relevant to the purpose of this paper. He says:

> Years ago Judge John F. Dillon, now of New York City, began his judicial career by an election to the office of district judge here in Davenport. He was so successful and able that when his term expired the members of the bar of this district, regardless of politics, indorsed him for reëlection, and I think no candidate was nominated against him, and, further, that Judge Dillon was a Republican in a then strong Democratic district. Now the above all occurred so many years ago it is legendary; but, nevertheless, from that beginning and from that time the seventh judicial district of Iowa has always had a "nonpartisan" judiciary. The lawyers of each county in the district meet in convention to elect delegates to a District Bar Convention. This latter nominates the candidates, and the political parties either indorse the nomination or else pass them. When a vacancy occurs, the bar, in the same manner, suggests to the governor the successor, and so far that official has always appointed the choice of the bar.
>
> A district chairman and secretary and committee is chosen, as is done by the political parties. Only those licensed to practice law are entitled to vote in the conventions.
>
> We have four judges now, — three Republicans and one Democrat. For years we had three Democrats and one Republican. Formerly we had only one judge.

For years the district was Republican, with a Democrat judge, and then for years it was the other way. Along in 1887 or 1888 the Democrat vote was six thousand or eight thousand above the Republican vote, and the former party made nominations against the nonpartisan candidates. But the latter were elected. This is the first and last time it has been tried.

As to the manner of selection, convention, and procedure at present, what I have stated I know, of course, to be true. But as to the history of the custom, all I know is it began long before my day, and I think with Judge Dillon, as I have stated.

The Presidents of the United States have generally appointed members of their own party to the federal bench. In 1801 the Federalists abolished the judiciary system of the United States as it had existed, and established circuit courts in each of the districts, with three judges for each circuit. President Adams at the closing hours of his administration filled all these places with Federalists. These are known as the "Midnight" judges. This act was repealed in 1803, and Jefferson appointed members of his own party to the bench. In 1863 President Lincoln appointed Stephen J. Field of California to the supreme bench, who was not a Republican, but known as a Union Democrat. In 1891 President Harrison appointed Judge Jackson, a Democrat, as justice of the Supreme Court. In 1891, when the Circuit Court of Appeals was created, President Harrison appointed two Democrats, one for the first and the other for the third circuit, out of the nine circuit judges. President McKinley appointed Judge Severans of Michigan, a Democrat, as circuit judge for the sixth circuit. He also appointed George Gray of Delaware as an additional circuit judge for the third circuit. This last appointment was perhaps made in recognition of Judge Gray's services on the Peace Commission that made the treaty with Spain at the close of the Spanish War. President Roosevelt appointed ex-Governor Jones, a leading Democratic politician of Alabama, as United States district judge for the districts of Alabama. The Supreme Court of the United States now consists of six Republicans and three Democrats. Out of the twenty-seven circuit judges eight are Democrats, and four of these were appointed by Republican presidents. More than three quarters of the judges of the United States District Court are Republicans. All the other judges of the federal courts are Republicans with the exception of one member of the Court of Claims.

The following states have a bipartisan judiciary as near as courts composed of odd numbers will admit:

New Hampshire	3 Republicans and 2 Democrats in each court
Connecticut	3 Republicans and 2 Democrats in each court
New York	4 Republicans and 3 Democrats in each court
New Jersey	5 Republicans and 4 Democrats in each court
Delaware	2 Republicans and 3 Democrats in each court
Illinois	4 Republicans and 3 Democrats in each court
Wisconsin	3 Republicans and 2 Democrats in each court

In Connecticut the two Democratic members of the supreme court have been reappointed by a Republican governor and legislature.

The professional politician who thinks that the chief end of a man is to get jobs for his friends and scalps from his enemies will render no assistance toward securing a division of political sentiment on the bench until forced to it by public demand. It is for the bar to create this demand.

I am fully aware that what I have said constitutes political treason, committed in the presence of more than two witnesses to the overt act. A revolutionary movement, however, when successful becomes patriotic, and when the reforms suggested are wrought out, the cause of justice will applaud its benefactors. In Kansas change from the political method of nominating and electing judges who are adherents of the dominant party is probably a long way off.

It is more difficult in a farming state for the bar to influence the general public than in commercial communities, where the lawyer has closer association with the people, and is oftener called on to serve them in matters of importance. The farmer generally thinks that the lawyer's compensation is disproportioned to the work done, measured from the standpoint of what he and his employees earn. These considerations make any reform in the respect discussed, through the efforts of the bar, extremely problematical in this state. That the result is hard of accomplishment does not, however, detract from its merit.

In the mechanism of clocks loss of time caused by the increased length of the pendulum in summer, due to the expanse of metals by heat, and a corresponding gain in winter by the contraction of cold, are counteracted by the use of a tube of mercury fastened to the lower part of the pendulum, which, by expansion under heat, is lengthened and transmitted to the top. By cold it is shortened, and thus the effect of heat or the absence of it is balanced and destroyed. This appliance corrects a defect scarcely appreciable and neutralizes surrounding influences which tend to inaccuracy in the recording of time.

Would it not strengthen the public confidence in the judiciary if there was a compensating membership in courts of last resort, opposed in numbers as nearly as practicable to those of a different political belief, to the end that in cases of a political nature the scales of justice might hang equally poised, not to be disturbed in their equilibrium by any unseen or unconscious force?

CLAIMS AGAINST THE STATE[1]

By Simon Fleischmann

This review of the entire situation will show that the attitude of the national and state governments and of political subdivisions and municipalities thereof, in meeting their obligations to private citizens, is still in discreditable shape. The United States government has no tribunal to which suitors can resort for redress in case they are injured by the tortuous acts of the government or its agents. Two thirds of the states have no courts or tribunals, whatsoever, for the enforcement of claims, either on contract or in tort. Municipal corporations, generally, are not liable for the wrongful acts of their officers, employees, or servants, when engaged in what is, with somewhat ambiguous comprehensiveness, known as the performance of governmental functions. In states which have established courts of claims and have conferred jurisdiction upon them in general terms, it will probably be held, as a rule, that the states are not liable for injuries inflicted by their officers or agents while engaged in the performance of governmental functions. The national government and some states have established courts for the trial of claims against the government, arising on contract; and a very few, for demands growing out of torts, when not committed in the exercise of governmental functions.

The state of New York has gone as far as, and perhaps further than, any other state in opening the portals of its court of claims to suitors having claims either on contract or in tort, though the highest court of this state has not yet passed upon the question whether this jurisdiction extends to torts connected with the exercise of governmental functions. However, the people of the Empire State may feel just pride in the consciousness that they are in the lead in forcing this current of the law out of the whirlpool and into the wholesome and moving stream of the law's progress.

It is claimed and believed by many that if the courts are thrown open to suitors having claims against the state, the amounts awarded will be much larger than if the disposition thereof be left to the legislature. When we consider, however, the influences brought to bear upon legislators, it is far more likely that, while there will probably be fewer claims in number presented to legislatures than to courts, the aggregate amount awarded will doubtless be far less through the halls of justice than through legislative lobbies. The experience in the court of claims of the state of New York confirms this contention. In the report of the attorney-general of New York, for 1909, gratifying results appear. Over four hundred claims were disposed of, the amounts claimed

[1] From a paper before the New York State Bar Association, 1910. Reproduced by permission.

aggregating $4,777,000; whereas the judgments recovered were only about $643,000, or about 13 per cent of the amount claimed. This total of judgments recovered was, in itself, exceptionally large, owing to the fact that it included many heavy claims growing out of the construction of the new Barge Canal, the number of such claims alone being seventy-nine and representing an aggregate claimed of $4,247,000, upon which judgments were rendered for a little more than $400,000, which was a part of the total of $643,000, for which judgments were awarded. Among the claims so allowed, were several arising from injuries received by the breaking of the rope on the inclined railway at Niagara Falls in July, 1907, for all of which $105,000 was demanded and $15,637 awarded. With the completion of the Barge Canal the exceptional claims for consequential damages, the disturbance of old water-power rights, and the like will disappear, and the amounts awarded in the general run of claims against the state will be comparatively small. During the year it further appears that eighty-nine claims, in which the total amount demanded was $394,109, were dismissed without any award. The virtue of the tribunal and its procedure, however, lay in the fact that every suitor had his day in court, with reasonable promptness, and his claim had legal, capable, and impartial investigation, with the right to the defeated party to appeal to the highest court of the state, and the certainty of receiving payment for such amount as the courts should finally allow. Above all, the Empire State thus sets the worthy example of reposing the same confidence in its own courts as it demands of its citizens and inhabitants; and when it shall, by statute, have enlarged its liability and that of its political subdivisions and municipalities to that of all persons and private corporations within its jurisdiction, it will have reached that goal of legal advancement for which it and all other commonwealths and communities should strive.

Having in mind, at all times, that a sovereign state insists on just dealings between its citizens in meeting their obligations to one another and to itself, upon what justifiable theory can the state itself refuse to do the same justice it requires of, and with the same instrumentalities it furnishes to, others? It will not do to say that a state cannot be sued without its consent. This must be so from the fact that governmental and judicial authority ultimately rests in the sovereign power. But it is no truer as applied to the state itself than as regards its citizens; for private parties cannot sue each other without the consent of the state, and the creation by it of courts for the adjustment of such controversies.

The allowance of disputed claims is a judicial function and should be assigned to judicial and not to legislative bodies. It is obvious, indeed, that the intrigue, favoritism, and lobbying inevitably connected with the allowance of claims by a legislature constitute most demoralizing influences and should be avoided on the plainest and highest principles of public policy. They have always been the source of political scandal,

wherever allowed or practiced. So the example of the state refusing to meet its own obligations cheerfully, promptly, and adequately must afford a most unwholesome example to the whole community and serve as a pretext for personal dishonesty.

The court of appeals of New York, in an early case, was urged to exempt municipalities from liability in all cases, whether exercising governmental or private functions, upon the ground that they must employ agents to discharge the duties imposed upon them by law. The court, in denying such sweeping immunity, used the following forcible language, alike applicable to the allowance of claims by any legislative body:

> As a corporation can only act by agents, such a rule of action would exempt it from legal liability in every case, whatever might be the circumstances; the natural and certain consequences of which would be innumerable applications to the common council for redress, legislatively, and which would bring in their train an organized body of soliciting parties and agents, the allowance sometimes of extravagant and unjust claims, the rejection, at other times, of meritorious ones, — in a word, all the evils attending a legislative body having control over large funds, and exposed to the solicitations and devices of a corps of artful and unscrupulous claimants and their hired or interested agents. Where the city now pays, in accordance with just legal principles, hundreds of dollars, it would probably then pay thousands, besides having in the halls of its local legislature scenes of a most forbidding character (Lloyd *vs.* City, 5 N. Y. 369, 375).

The nation, the state, the county, and the city should be placed by legislative or constitutional enactment upon precisely the same basis as is every individual and private corporation. There should be no distinction or quibbling as to the difference between governmental or other functions. The state or municipal corporation can, from its very nature, act only through officers and other agents; and where it injures a private person through some act of commission or omission, which would give a cause of action against a private person or private corporation, the state or municipality immediately employing such agent should respond in damages, or afford other appropriate legal or equitable relief, under an enforceable judgment or decree of a judicial tribunal. The state will have ample protection and fairness of treatment in courts of its own creation.

It seems to me, further, that no special courts of claims or other special tribunals should be created at all for the enforcement of private claims against the state, but that this jurisdiction should be conferred upon the existing courts of record of each state, which are deemed sufficient for controversies, unlimited in amount or consequence, between citizens or private corporations. The state, in other words, as a whole, should show the same confidence in its own courts as it asks other suitors to repose in them. The jurisdiction of the federal courts in suits by citizens of one state against another state as such, contemplated

by the original federal Constitution, before the eleventh amendment was adopted, should be restored, to render this jurisdiction harmonious, complete, and efficient, and to make it impossible for a state to repudiate its debts to any one. Should the state or city desire to protect itself against actionable wrongs to which its officers and agents may subject it, let it take bonds of indemnity from them, as it does for many purposes. But the injured party should have a right to look to the principal in the transaction, precisely the same as in the case of injury done by the agent of a private person or corporation.

The time will come when states will do full justice, for instance, to those whom it may have imprisoned and whose innocence shall afterwards be established, by public proclamation and pecuniary compensation, just as it compels private individuals to respond in damages in cases of false imprisonment. As illustrating the injustice of the law in this regard, a telegram to the country at large, only a few days ago, announced that a prisoner in a near-by state had just been released, although the indictment under which he had been confined had been dismissed three months before his actual discharge, the incident of his imprisonment having been overlooked by the district attorney.

So the law should be comprehensively amended to correct the great injustice now generally existing, under which citizens who suffer acute and substantial so-called consequential damages, from the establishment of public improvements in public streets and places, may not be left wholly without remedy, as they are in many instances. In one such case, in which relief was denied, Judge Gray, of the court of appeals of the state of New York, properly said:

> In this connection I may say that for such consequential damages as are sought to be recovered here from a railroad company, which is lawfully in the occupation and use of a street, but which, incidentally, is the occasion of injury to property owners in an adjoining street, by reason of its performance of the statutory duty to conform its grade to the new use, the legislature might very properly, under limitations, grant a remedy. Without such remedial legislation, however, the case is one of *damnum absque injuria* (Rauenstein *vs.* N. Y., L. & W. R. Co., 136 N. Y. 528).

While I appreciate that situations arise in which the financial limitations of a community may make it necessary to prescribe limits, geographical or otherwise, beyond which remote or consequential injury to property rights, resulting from public improvements or necessities, cannot be paid or adequately compensated, there can never be any justification for repudiating debts or obligations which have been incurred or responsibility for acute injuries inflicted; and in no event should the doctrine of the limitation of public liability for damage or harm done, be restricted beyond absolute and imperative necessity. In other words, all of the people of a state or community should not, because of their consolidated interests, profit at the expense of any one member or citizen

thereof, as they do, when they refuse to meet their aggregate obligations to any one of their number. In the (Rauenstein) case above cited, the court, in referring to a prior decision, where damages had been allowed under a different state of facts, voiced this sentiment in the following words:

> The reasoning of the decision was that, while it was quite probable that the general interests of Buffalo and of the public were promoted by the appropriation of the street, it by no means followed that a lot owner, whose property is injured, should bear the loss for the public benefit.

No government can afford to be other than scrupulously just in its dealings with other states, as well as with individuals and private corporations. If honesty is the best policy for individuals, it is quite as much so for communities in their official entity. A state must, above all things, be sound at the core, and must realize that honesty, like charity, begins at home. It is amazing and discouraging to contemplate how slowly the appreciation of these truths is making progress, especially in view of the advance that has been made in other directions. It appears to be a problem, the solution of which, from its wide scope and lack of frequent and acute application, has, so to speak, gone by default. Of course demagoguery and cheap rhetoric about protecting taxpayers against unjust claims have played, and will continue to play, their part in retarding progress. But right will eventually prevail in the nation, not only as a whole, but down to its smallest political subdivision, and the maxim, "The king can do no wrong," especially inapplicable in a government having no ruler except the people in their own sovereignty, will gradually give way to the nobler precept, "There is no wrong without a remedy."

IV

THE CRIMINAL LAW

DELAYS AND DEFECTS IN THE ENFORCEMENT OF LAW IN THIS COUNTRY[1]

By William H. Taft

If one were to be asked in what respect we had fallen farthest short of ideal conditions in our whole government, I think he would be justified in answering, in spite of the glaring defects in our system of municipal government, that it is in our failure to secure expedition and thoroughness in the enforcement of public and private rights in our courts. I do not mean to say that the judges of the courts are lacking in either honesty, industry, or knowledge of the law, but I do mean to say that the machinery of which they are a part is so cumbersome and slow and expensive for the litigants — public and private — that the whole judicial branch of the government fails in a marked way to accomplish certain of the purposes for which it was created.

Generally in every system of courts there are a court of first instance, an intermediate court of appeals, and a court of last resort. The court of first instance and the intermediate appellate court should be for the purpose of finally disposing, in a just and prompt way, of all controversies between litigants. So far as the litigant is concerned, one appeal is all that he should be entitled to; the community at large is not interested in his having more; for the function of the court of last resort, usually called the supreme court, is not primarily for the purpose of securing a second review or appeal to the particular litigant whose case is carried to that court. It is true that the court can only act in concrete cases between the litigants, and so incidentally it does furnish another review to the litigants in every case where it entertains an appeal; but the chief reason for granting such a review is to enable the supreme court to lay down general principles of law in the interpretation of state or federal constitutions or statutes, or in the application of the common law, for the benefit and guidance not of the particular litigant affected but of the communities at large. Therefore the appellate jurisdiction of the

[1] An address delivered before the Civic Forum, New York City, at Carnegie Hall, April 28, 1908.

supreme court should generally be limited to those cases which are typical, and which give an opportunity to the court to cover the whole field of the law upon the subject involved. The highest function of the Supreme Court of the United States is the interpretation of the Constitution of the United States, so as to guide the other branches of the government and the people of the United States in their construction of the fundamental compact of the Union. Take it all in all, in the discharge of this function the judicial department is the most novel, as it is in many respects the most important, branch of the government. It is the background of the whole government. In its power of ultimate decision as to the respective jurisdictions of the various departments of the national government, as to the boundaries between state and national control, and as to the guarantees of life, liberty, and property to the individual, it is the balance wheel of the governmental system. The supreme courts of the states exercise a similar, but of course a less important, function within their respective states. It is to be presumed that the supreme courts, in the course of their decisions on general law, will lay down with reasonable accuracy principles with sufficient clearness to enable the inferior courts to dispose of cases involving similar principles. The great body of the litigation involving particular controversies between individuals should be confined to the courts of first instance and the intermediate appellate courts, and one appeal is all that any litigant should be entitled to.

In the Supreme Courts of the United States and of the several states business is disposed of with as great promptness as is consistent with the proper exercise of their important jurisdiction. It is in the courts of the first instance and in the intermediate appellate courts, however, that there is much more delay than is necessary. In the first place, the codes of procedure are much too elaborate. It is possible that they should be both simple and effective, as is shown by the present procedure in the English courts framed by rules of court. The code of the state of New York, however, is staggering in the number of its sections. A similar defect exists in some civil-law countries. The elaborate Spanish code of procedure that we found in the Philippines could be used by a dilatory defendant to keep the plaintiff stamping in the vestibule of justice until time had made justice impossible. Every additional technicality, every additional rule of procedure, adds to the expense of litigation; and it is inevitable that with an elaborate code the expense of a suit involving a small sum is in proportion far greater than that involving a large sum. Hence it results that the cost of justice to the poor is always greater than it is to the rich, assuming, as we reasonably may, that the poor are more often interested in small cases and the rich in large ones.

Jury trials also add to the elaborate machinery necessary for the adjustment and decision of the rights of the litigants, and they greatly increase the time and expense involved in the disposition of litigation.

Another reason for unreasonable delay in the lower courts is the disposition of judges to wait an undue length of time in the writing of their opinions or judgments. I speak with confidence on this point, for I have sinned myself. In English courts the ordinary practice is for the judge to deliver his opinion immediately upon the close of the argument, and this is the practice which ought to be enforced so far as possible in our courts of first instance. It is a great deal more important that the court of first instance should decide promptly than that it should decide right. The practice of deciding cases at the close of the hearing makes the judge very much more attentive to the oral argument of counsel, and much more likely, on the whole, to decide right when the evidence and the arguments are fresh in his mind. In the Philippines the system had been adopted of refusing a judge his regular monthly stipend unless he can file a certificate, with the receipt for the money, in which he certifies on honor that he has disposed of all the business submitted to him within the previous sixty days. This has had a marvelously good effect in keeping the dockets of the court clear.

One of the great difficulties with the profession of the law is the disposition both of judges and of advocates to treat the litigants as made for the courts and the lawyers, and not the courts and lawyers as made for the litigants. And as it is lawyers who, in judiciary committees of the legislatures, draft the codes of procedure, it too frequently happens that the motive for simplifying the procedure and making the final disposition of cases as short as possible is not as strong as it should be. In the end such simplification would be greatly in the interest of the lawyers, for the present conditions of delay in the courts lead many people to arbitrate their case out of court or to yield to unjust claims rather than to expose themselves to the nervous strain and expensive burden of a long-drawn-out contest in court.

In my opinion the best method of securing expedition in the disposition of cases is to leave to the judges of the court the forming of the procedure by rules of court, imposing upon them the obligation to adopt rules making the course of litigation as speedy and as inexpensive as possible. I venture to think that the plan by which the justices of the peace who try smaller cases, and who are neither professional men nor apt in the disposition of business, is not a wise feature of the present system. The poor should have the benefit of as acute and able judges as the rich, and the money saved in the smaller salaries of the judges of the inferior courts is not an economy in the interest of the public. Such judges, after their reputations have become established, would lead the parties seeking their jurisdiction to dispense with juries and to submit their controversies for immediate decision. Under able, educated judges, who understand the purpose of the law in creating them, I am quite sure that courts of conciliation, for the purpose of settling small controversies without pleading, without lawyers, and without appeals, could be

made successful. They have been made successful in Germany, and I do not see that there is such a difference of conditions in this country as to prevent their being useful here.

It may be asserted as a general proposition, to which many legislatures seem to be oblivious, that everything which tends to prolong or delay litigation between individuals, or between individuals and corporations, is a great advantage for that litigant who has the longer purse. The wealthy defendant can almost always secure a compromise or a yielding of lawful rights on account of the necessities of the poor plaintiff. While such a condition in the administration of human law cannot be entirely eradicated, its injurious effect may be minimized by speeding the litigation and reducing the opportunities of either litigant to prolong it.

Many people who give the subject hasty consideration regard as the noblest product of human wisdom a system of appeals by which a suit can be brought before a justice of the peace and carried through the several intermediate courts of appeal to the supreme court of the state. How many legislative halls have rung with the eloquence of defenders of the oppressed and the poor, in opposing laws which were designed to limit the appeals to the supreme court to cases involving large sums of money or questions of constitutional or other important law! Shall the poor man be denied the opportunity to have his case reëxamined in the highest tribunal of the land? Never! And generally the argument has been successful. In truth, there is nothing which is so detrimental to the interests of the poor man as the right which, if given to him, must also be given to the other and wealthier party. It means generally two, three, and four, and in some cases even five and six, years of litigation. Could any greater opportunity be put in the hands of wealthy persons or corporations to fight off just claims and to defeat, injure, or modify the legal rights of poor litigants, than to delay them in securing their just due for several years? I think not. The fact is that procedure which limits the right of appeal works in the end for the benefit of the poor litigant and puts him more on an equality with a wealthy opponent. While it is probably true that the disposition of the litigation is more likely to be just when three tribunals have passed upon it, the injustice which meantime has been done by the delay to the party originally entitled to the judgment, generally exceeds the advantage that he has had in ultimately winning the case. So confirmed have we become in our views that delays are essential in litigation, that, in the minds of many lawyers and other persons familiar with the courts, the right of a litigant to delay before being called upon to respond in damages, or in other ways, to the just claim of another, is supposed to inhere either in the constitution of the state or in the orderly administration of courts. To hasten a litigation to an end within six months against the protesting defendant who is mulcted and compelled to pay within that short period, is even characterized as "railroading."

There is no foundation in the attitude of the courts for the complaint that the courts are made for the rich and not for the poor; for the judges of this country are as free as possible from prejudice of that kind. But the inevitable effect of the delays I have referred to is to oppress and put at a disadvantage the poor litigant; and while I do not mean to say that it is possible, humanly speaking, to put the rich and the poor on an exact equality in regard to litigation, it certainly is possible to reduce greatly the disadvantages to the man of little means if the courts and legislatures would devote themselves to the elimination from the present system of those provisions which tend to prolong the time in which judicial controversies are disposed of.

When we come to the administration of criminal law and the assertion of public right, which have a more direct bearing upon the welfare of the whole people than the settlement of private rights, the injurious delays caused by the procedure provided by legislative act are greatly accentuated. No one can examine the statistics of crime in this country and consider the relatively small number of prosecutions which have been successful, without realizing that the administration of the criminal law is a disgrace to our civilization. Some of the causes for the lax administration of the criminal law may be found in the lenient, happy-go-lucky character of the American people, absorbed in their own affairs and not fully realizing that this tremendous evil exists in the community.

In criminal cases the jury system is essential to secure the rights of the individual against possible abuses by the government; but it necessarily causes delay. The grand-jury system enforced by the federal Constitution, although not required in many of the states, is another cause of delay in bringing criminals to justice. Fully conceding the necessity of these constitutional restrictions as essential under our form of government to the preservation of the liberty of the individual, we still find a large field in which the legislature, by formulating proper and expeditious criminal procedure, could avoid the discouraging and disgraceful delays that now exist, when the criminal has the means to employ acute lawyers who take advantage of every technical necessity presented by the rules obtaining in the trial of criminal causes. Every month of delay in bringing a person charged with crime to justice inures, in his ultimate trial, to his benefit. In order to resist the amiable tendency of human nature toward mercy and compassion for the unfortunate charged with crime, a jury must be strongly imbued with the right of the public to have crime punished, and the further backward into the past the facts upon which the prosecution is based are pursued, the less strongly does the jury feel its obligation to the public at large to restrain future crime by the punishment of offenses committed in the distant past.

Again, the procedure provided by legislative enactment for the trial of the crime itself too frequently affords the opportunity to prolong the trial, and exaggerates into undue prominence circumstances having no

direct bearing upon the innocence or guilt of the defendant, but calculated to divert the minds of the jury from the real issues, and ultimately to lead to a disagreement or to an acquittal of a really guilty man. Of course such a result could hardly be obtained except by the employment of skilled counsel of dramatic power, able to confuse the minds of the jury, to destroy their sense of proportion, and to make them reach conclusions as jurymen which, as men in their own business, they would repudiate as absurd. The creation of an atmosphere of fog and error and confusion is only possible under a system in which the power of the court to control its own proceedings and to guide the jury to some extent in the way in which it should go, is so limited by rules of judicial procedure laid down by legislative enactment that the judge becomes nothing but a moderator of the proceedings and helpless in the hands of an acute and eloquent counsel for the defense. The theory of legislatures in this country and, indeed, the popular view, seems to be that it somehow works for the benefit of the public that the power of the judge in the courtroom should be greatly reduced and the power of the jury greatly magnified; and we discover the tendency to this view more and more as we go toward the western and the newer states. The fact is, however, that every expedient which weakens the power of the court and increases the power of the jury has an effect wholly different from that which is intended, and increases the advantage enjoyed by the wealthy when brought before the bar of a criminal court.

No legislature can legally take away from the jury in this country its power to do what it believes to be right under the instructions of law received from the court. The power of the court to comment on the evidence, to point out its strength or its weakness, can never take from the jury its authority to decide upon the facts. The restoration, therefore, of the procedure which obtained at the common law and which still obtains in England, in the courts of the United States and in some state courts, by which the verdict rendered is the result of the independent judgment of the jury guided both by instructions by the court as to the law and also by suggestions and comments as to the facts, could work no injustice to any person brought into court, and would secure not only greater efficiency in the enforcement of the criminal law, but also much greater speed in the disposition of cases.

We have, as is well understood, certain constitutional restrictions as to the procedure in criminal cases, which offer protection to the accused and present difficulties in the proof of his guilt. But these obtain as well in the English courts as in our own, and their existence does not offer a reason for the delays from which we suffer, for such delays do not exist in the administration of justice in England. A murder case which in this country is permitted to drag itself out for three weeks or a month, in England is disposed of in a day, two days, or, at the most, three days, — certainly in less than one fifth the time. This is because the English

judges insist upon expedition by counsel, cut short useless cross-examinations, and confine the evidence to the nub of the case. They exercise the greater power, which, under the common-law rule, has always been exercised by the court. Under such practice it would be possible for the prosecuting attorneys to clear their dockets; as it is now they are utterly unable to do so.

At the present time, in our larger cities, a man who is indicted and has means with which to secure bail is released on bond, unless he is confined for murder in the first degree. The pressure upon the prosecuting officers is for the trial of those who are in jail and unable to give bail, and as a result of the delays I have mentioned, jail cases are protracted and the trial of those who are released on bail is postponed oftentimes to the indefinite future, the evidence disappears, newer and more sensational cases come on, and ultimately nolles are entered and the indicted man escapes. This is one explanation why so many crimes go wholly unpunished.

Another cause of the inefficiency in the administration of the criminal law is the difficulty of securing jurors properly sensible of the duty which they are summoned to perform. In the extreme tenderness which the state legislatures exhibit towards persons accused as criminals, and especially as murderers, they allow peremptory challenges to the defendant far in excess of those allowed to the prosecution. In my own state of Ohio, for a long time, in capital cases, the law allowed the prosecution two peremptory challenges and the defendant twenty-three. This very great discrimination between the two sides of the case enabled the defendant's counsel to eliminate from the panel every man of force and character, and to assemble a collection in the jury box of nondescripts of no character, who were amenable to every breeze of emotion, however maudlin or irrelevant to the issue.

I do not think that the members of the bar can escape the responsibility for the demoralizing tendencies to which I have referred. The perversions of justice in my own city of Cincinnati in 1884 led to the appointment of a committee of the bar to visit the legislature, to urge it to rid our criminal code of procedure of those features which placed the prosecution at an unfair disadvantage in the trial of capital cases. The indignation of the public at some of the failures of justice in flagrant cases of crime had led to a riot and to the burning of our courthouse, and the public finally became aroused to the serious defects in the law. I had the honor of being one of those who waited upon the Judiciary Committee of the Ohio legislature and preferred the request that the twenty-three challenges allowed to the defendant be reduced to twelve, and that the state be allowed a similar number; but we found that there were upon that committee lawyers a substantial part of whose practice consisted in acting as counsel for defendants in criminal trials. When I protested that twenty-three challenges was an outrageous number, the

chairman of the committee leaned back with the remark, "Many a time I would have given all my fee to have had twenty-four challenges for the defendant." I cite this instance because I believe that the unjust disposition to curtail the power of judges is due more or less to the intervention of some members of the bar whose practice is more or less beneficially affected, as they conceive, by obstacles thus created to the due course of justice.

Another reason for delays in the enforcement of criminal law is to be found in the right of repeated appeals which are given in criminal cases. The code of evidence, with its complicated rules and numerous technical statutory limitations designed to favor the defendant, are all used as a trap to catch the trial court in error, however technical, upon which, in appellate proceedings, a reversal of the judgment of the court below may be obtained. The rule which generally obtains in this country is, that any error, however slight, must lead to a reversal of the judgment, unless it can be shown affirmatively that it did not prejudice the defendant. The disposition on the part of the courts to think that every provision of every rule of the criminal law is one to be strictly construed in favor of the defendant, and even widened in its effect in the interest of the liberty of the citizen, has led courts of appeal to a degree of refinement in upholding technicalities in favor of defendants, and in reversing convictions, that renders one who has had practical knowledge of the trial of criminal cases most impatient.

In a case carried on error to the Supreme Court of the United States the point was raised for the first time in that court that the record did not show an arraignment of the defendant and a plea of not guilty; and on this ground the court, three judges dissenting, reversed the judgment. There was not a well-founded doubt of the fact that the defendant was arraigned and pleaded not guilty. The record itself raised a presumption that this was the fact; but the judgment was reversed, although there was not a pretense that the defendant had suffered any injury at the trial by reason of the alleged defect in the procedure. When a court of highest authority in this country thus interposes a bare technicality between a defendant and his just conviction, it may be pertinent to inquire whether some of the laxity in our administration of the criminal law may not be due to a proneness on the part of courts of last resort to reverse judgments of conviction for narrowly technical error. There ought to be introduced into the statutes of every state and of the United States, in regard to appeals in criminal cases, — and, indeed, in regard to appeals in civil cases, — a provision that no judgment of a trial court should be reversed except for an error which the court, after reading the entire record, can affirmatively say would have led to a different verdict and judgment. This would do no injustice and would end reversals for technicalities.

And, now, what has been the result of the lax administration of criminal law in this country? Criminal statistics are exceedingly difficult to

obtain. The number of homicides, the number of lynchings, and the number of executions one can note from the daily newspapers, but the number of indictments, trials, convictions, acquittals, or mistrials it is hard to find. Since 1885 in the United States there have been 131,951 murders and homicides, and there have been 2286 executions. In 1885 the number of murders was 1808. In 1904 it had increased to 8482. The number of executions in 1885 was 108. In 1904 it was 116. This increase in the number of murders and homicides as compared with the number of executions tells a startling story. As murder is on the increase, so are all offenses of the felony class, and there can be no doubt that they will continue to increase unless the criminal laws are enforced with more certainty, more uniformity, and more severity than they are at present.

The strongest force in our community is public opinion, and frequently the existence of evils in the community is due to the fact that it is not sufficiently directed to the evil in hand. The enormous discrepancy between the crimes which are committed and the crimes which are actually brought to trial is sufficient to show that public opinion is not alert enough, and is not directed against prosecuting officers and judicial officers with sufficient vigor to bring to trial every man guilty of an offense. In recent years we have been engaged in the trial of wealthy men and corporations charged with violating the antitrust laws and the antirebate laws, or laws against railway-rate discrimination. In these trials there has been brought home to the public the difficulty of securing the conviction of wealthy defendants, who employ acute counsel to take advantage of all the technicalities and delays which the present criminal procedure makes possible. And it is quite possible that the escape of wealthy malefactors from just punishment will bring home to the people at large the conviction which ought to obtain, that by the tenderness toward the individual charged with crime manifested by legislatures and lawmakers during the last fifty years in this country, great injustice has been caused to the interests of the public, and that the time has come to call a halt.

CRIME AND JUDICIAL INEFFICIENCY[1]

By James W. Garner

Ex-President Andrew D. White, in a recent address at Cornell University, declared that as a result of extensive studies carried on through a long period of years and in all parts of the Union he had become convinced that the United States leads the civilized world, with the exception perhaps of lower Italy and Sicily, in the crime of murder and especially of unpunished murders.

[1] From the *Annals of the American Academy*, 1907.

The truth of this severe arraignment is easily established by reference to the statistics of crime in this and other countries. The appalling increase in the one crime of murder in the United States is apparent from the following table compiled by the Chicago *Tribune* and published in its issue of December 10 last.[1]

Year	Number of murders and homicides in the United States	Number for each million of people	Number of executions in the United States	Number of murders and homicides to each execution	Number of lynchings
1885	1,808	32.2	108	17	181
1886	1,499	26.1	83	18	133
1887	2,335	39.8	79	29	125
1888	2,184	36.4	87	25	144
1889	3,567	58.2	98	36	175
1890	4,290	68.5	102	42	123
1891	5,906	92.4	123	56	193
1892	6,791	104.2	107	63	230
1893	6,615	99.5	126	52	200
1894	9,800	144.7	132	73	189
1895	10,500	152.2	132	79	166
1896	10,652	151.3	122	87	131
1897	9,520	132.8	128	74	166
1898	7,840	107.2	109	72	127
1899	6,225	83.6	131	87	107
1900	8,275	108.4	117	71	115
1901	7,852	100.9	118	67	135
1902	8,834	111.7	144	61	96
1903	8,976	112	124	72	104
1904	8,482	104.4	116	73	87
Total . . .	131,951	. . . .	2,286	57	2,917

It will be seen from the above table that within the space of twenty years the number of homicides has increased nearly 400 per cent; that the proportion of 32 homicides to each million of the population has grown to 104, and that the number of legal executions has remained substantially what it was when the number of homicides was only one fourth as great as now. Compared with conditions in other lands, the situation in the United States, as revealed by the statistics quoted above, is not only disgraceful to American civilization, but is highly serious and deserves the thoughtful consideration of all good citizens. As against nearly 9000 homicides in the United States in 1903, only 321 were reported in the German Empire, with approximately 60,000,000 inhabitants; only 322 in England and Wales, with a population of 32,500,000; 526

[1] I cannot verify the accuracy of the above statistics. A carefully prepared table, published by Judge William H. Thomas, of Montgomery, Alabama, covering the years 1881–1906, shows substantially the same results.

in France, with a population of 38,000,000, and 61 in the Dominion of Canada, with a population of 5,000,000. With 112 homicides to each 1,000,000 of the population in the United States in 1903, England and Wales had less than 10 (1902), France 13½ (1899), the German Empire less than 5 (1899), and Canada about 12 (1903). In the city of Chicago in 1906, 187 homicides were reported, as against 24 in London, with a population three times as great, 22 in Paris, and 44 in Berlin, including attempted murders. The worst feature about the situation in the United States is the small number of convictions and executions, the latter being but little more than 1 per cent of the homicides, 1 in 73 (1904), while the number of lynchings exceeds the number of legal executions.[1] With 187 homicides in Chicago last year, there were but 2 cases of capital punishment, and the Cook County jailer informs me (April, 1907) that there are no murderers awaiting execution.

These facts need little comment. Taken in connection with the statistics of the increase of other crime than murder, they reveal a reign of lawlessness, a disrespect for constituted authority, and a judicial inefficiency without a parallel in any other civilized country. Dr. Cutler, in his interesting volume on "Lynch Law," shows that during the last twenty years more than three thousand persons have been put to death in the United States by lynch law, whereas, according to the statement of a well-known American jurist, there has not been a case of lynch law in England for seventy-five years, and possibly the same may be said of Canada, which is separated from the United States only by an imaginary boundary line.[2] Everywhere in the United States we find an increasing disposition upon the part of the people to "take the law into their own hands," as they say, where there have been flagrant failures of justice, and inflict, by mob law, that punishment which should alone be the function of the courts. The causes for the extraordinary increase of crime in the United States are due partly to the tolerant attitude of the people toward the criminal class and partly to the lax administration of the criminal law, which, by impairing popular confidence in the efficiency of the courts, fosters the mob spirit among all classes, and by the uncertainty or failure with which it metes out punishment, encourages the violation of law. There is, as ex-President White has pointed out, too much sham humanitarianism, too much overwrought, maudlin sentimentality in favor of the criminal and too little appreciation of the rights of society. In spite of the extraordinary increase of the crime of murder,

[1] These statistics are compiled mainly from the tables of the Chicago *Tribune*, the estimates of Judge Thomas, referred to above, and the Statesman's Year-Book. See also tables of statistics in the Chicago *Record-Herald* for July 3, 1906. Statistics recently collected by the New York *World* show that in 1904, out of 216 convicted murderers in the prisons of New York state, only 5 were awaiting execution, and that of 2107 murderers held for trial in that state during the ten years from 1896 to 1905 only 32 were capitally punished.

[2] Several well-informed Canadians inform me that they have never heard of a case of lynching in the Dominion, and upon inquiry I have received similar testimony regarding the German Empire.

we hear it said that the state has no right to put murderers to death.[1] Convicted criminals of the worst type are pardoned through personal sympathy for their families, sometimes upon the ridiculous representation that they have made "brave fights" against "fearful odds" for their lives, not infrequently upon petitions signed by the judge and jury who made the conviction or by those of the community who have been wronged. One of the worst traits of American civilization, as compared with that of England and some of the countries on the continent, is the general disrespect for law among all classes. To one familiar with the law-abiding instincts of the English people and their regard for authority the lawlessness of Americans seems strange indeed, considering the racial identity of the two peoples and the similarity of their legal institutions.

To a large extent conditions in America are due, as I have said, to inefficient administration of the criminal law, — are the result, to use the language of Justice Brown of the United States Supreme Court, of the failure of the courts to discharge their natural functions. This view is no longer confined to the ranks of laymen, but, and it is an encouraging sign, the best and most candid judges and practitioners are beginning to admit that there are communities in the United States where there has been a virtual breakdown of the administration of criminal justice.[2] The causes of this inefficiency are not far to seek. They arise mainly from a cumbersome and antiquated procedure which is slow to start, which permits unnecessary delay in expediting trials once begun, which attaches undue importance to technicalities, as a result of which the fundamental question of establishing the guilt or innocence of the accused is subordinated to mere matters of practice and procedure, that is, primarily to the attainment of technical perfection. In the second place, the workings of the jury system in the form in which it exists in the American states, together with a too wide latitude of appeal, are responsible for a large proportion of the miscarriages of justice and the escape of criminals from deserved punishment.

The constitutions of all the states guarantee to the accused a "speedy" trial, but there are few communities where this guaranty is anything more than an empty declaration. Nearly everywhere the jails are full of

[1] Mayor Dunne of Chicago has recently expressed this opinion. The offenses of robbery, burglary, and assaults upon women in this city during the last year have been so numerous and bold as to cause general alarm. A bill fixing the death penalty for these offenses is now before the legislature. One of the senators from Chicago, in advocating the bill, declared that there were communities in his district in which the citizens were constantly terrorized. Women, he declared, could not venture on the streets even in daylight without being assaulted, and, if they resisted, murdered. The city council passed a resolution memorializing the legislature to prescribe the death penalty for assaults on women and children, but until there is a different public attitude toward crime there is little likelihood that this will be done.

[2] Hon. William H. Taft, a man who has had large experience both at the bar and on the bench, recently declared in an address at Yale University: "I grieve for my country to say that the administration of the criminal law in all the states of this Union (there may be one or two exceptions) is a disgrace to our civilization." Judge Amidon, of the United States District Court for the district of North Dakota, recently, in an address before the Minnesota Bar Association, expressed a similar opinion of our system of criminal justice.

prisoners who have waited months for trial, and everywhere the dockets of the courts are congested with cases which cannot be reached for months or years. It was put in evidence before the New York State Commission on the Law's Delay, in 1903, that on the first of November of that year there were ten thousand untried jury cases on the calendar of the first department of the Supreme Court of that state. The court was then three years behind with its work, and it required from one and a half to two years to reach a jury trial in King's County and in the eighth judicial district (western New York).[1] The clerk of the superior court of Cook County, Illinois, writes me that at the beginning of the present year 12,653 cases were pending before the superior court and 18,828 cases before the circuit court. During the last two years these courts have made notable progress toward clearing their calendars, although the former is still more than a year behind and the latter about two years in arrears with its work. In some of the other states conditions are even worse than those here described. Aside from the injury to the accused, the effect of such delays is often to defeat the ends of justice.[2] During the long period intervening between the commission of the offense and the beginning of the trial witnesses sometimes die, or remove from the jurisdiction of the court, or, owing to the infirmities of memory, forget material facts in regard to the crime, and, what is a common occurrence, public interest in the case subsides, thus removing that pressure which is one of the chief incentives to induce the state's attorney to prosecute the case. The judicial annals of all our states are full of flagrant instances of the breakdown of justice on account of the delays in bringing cases to trial. At this moment I recall a case, reported in the press dispatches last July, of a man who was kept in a Milwaukee jail for ten months awaiting trial on a charge for which the maximum punishment was ninety days' imprisonment.[3] An "outrageous" instance of such a delay, to use the language of an Illinois lawyer, is afforded by the Iroquois Theater fire case. The fire occurred on December 30, 1903, resulting in the loss of nearly six hundred lives, and two months later the owner of the theater was indicted. The indictment was held under

1 Report of Commission on the Law's Delay, pp. 8, 17.

2 This is particularly true as regards civil controversies. Mr. Wheeler H. Peckham, chairman of the New York Commission on the Law's Delay, related before that body an instance illustrating this fact. He said he had a case in which there were two witnesses, and while waiting fifteen months for an opportunity to bring it to trial, one of the witnesses died and the other moved away. He concluded, therefore, that it would be better to abandon the case, and so it was dropped (Commission on Law's Delay, p. 169). Justice Gaynor, testifying before the same commission concerning the necessity of bringing commercial cases to trial speedily if they were to be tried at all, declared that such cases could rarely "live more than three months, and that in three years they were as dead as a door nail" (ibid. p. 273).

3 One of the causes of delay in bringing cases to trial is the grand-jury system. After arrest and hearing before a magistrate, the accused must be held to await the action of a grand jury that may not be summoned within three or four months. The remedy is that already adopted in a considerable number of states, and which has existed in Connecticut nearly a hundred years, namely, to authorize trials upon information by the state's attorney, subject to certain restrictions in the interest both of the criminal and the society.

advisement three months by the judge and then quashed. On March 4, 1905, a new indictment was made, and it was held by the judge for a period of seven and a half months. Then an entire week was spent in arguing the question of a change of venue. Finally, in March, 1907, about four years and three months after the fire, the case was brought to trial, only to result in the acquittal of the defendant upon instructions from the court that the building ordinances under which the indictment had been found, were defective; that is, the verdict was based not on the merits of the case (the judge said the defendant might be morally guilty but not legally guilty) but rather on a technicality. That criminal prosecutions may be more promptly initiated and rapidly expedited the experience of England affords abundant evidence. It is the practice there to bring the accused before a magistrate within a few hours after his arrest and commit him to the next session. Rarely three months elapse between the commitment and the infliction of the punishment, if he is found guilty.[1]

After the case has been reached on the calendar there is the delay of impaneling the jury, — a delay which, under the practice of most of our states, is coming more and more to be an intolerable evil. This proceeding, as Justice Brown well observes, ought never to consume more than an hour or two, and under the English procedure this is the rule. Two flagrant instances of this evil were recently afforded by the Gilhooley and Shea cases in Chicago. In the former case nine and a half weeks were required to select the jury, involving an examination of 4150 talesmen, and at a cost of some $20,000 to the state. The selection of the first Shea jury required thirteen weeks, the summoning of 10,000 veniremen, the examination of 4716 talesmen at a cost of $40,000 to the state and over $20,000 to the defendant, and there is no reason to believe that the jury finally chosen were any better qualified than the first twelve men examined.[2] The court permitted counsel to introduce false issues and ask irrelevant questions concerning their social, religious, and business affiliations, thus laying the foundations for indefensible challenges.[3] In the Gilhooley trial counsel for the defense interrogated one of the

[1] It is refreshing to note a marked awakening of sentiment among the judges to the evil described above. Recently Judge Barnes, of Chicago, declared that "the trouble with our criminal law is that offenders are not brought quickly enough to trial. If a man, as soon as he commits a crime, could be brought immediately to trial and sentenced forthwith, we should have a very great decrease of crime." State's Attorney Healy, of Cook County, has expressed a similar opinion.

[2] T. Newton Crane, Esq., formerly a member of the St. Louis bar, but for some years past a prominent barrister of London, in a letter to Hon. Joseph H. Choate under date of March 31, 1903, speaking of the English procedure of impaneling juries, said: "The examination of jurors on their *voir dire* is absolutely unknown in England, while many lawyers who have been in practice for twenty years or more have never known a juror to be objected to or excused for cause. It not infrequently happens that the same twelve jurymen will hear three cases without leaving the box" (Report Commission on Law's Delay, p. 111).

[3] Another illustration of the practice of irrelevant interrogatories in the selection of juries was recently offered by the Iroquois Theater fire case, where counsel for the defendant asked prospective jurors whether they had any prejudices against dancing, whether they

jurors nearly two hours, mostly on immaterial matters, and the state's attorney put him through a similar ordeal, the request of the state that thirty minutes be made the maximum time for the examination having been denied by the court. According to the English practice the requirements of due process of law in the selection of juries are satisfied by the simple inquiry whether the prospective juror is in any way related to the defendant, and if he knows of any reason why he is unable to return a verdict in accordance with the law and the evidence. In the second Shea trial the judge followed this sensible rule, and the jury was selected in twelve days. He refused to permit the disgraceful wrangling, dilatory obstructions, and rambling, long-drawn-out, and irrelevant interrogations which marked the proceeding by which the first jury had been impaneled.

The remedies for most of the evils that have grown up in connection with the selections of juries are the prohibition of irrelevant examinations, the making of the decision of the trial judge final upon objections to questions asked prospective jurors, and the forbidding of reversals upon such decisions unless they amount to a clear abuse of discretion, a substantial reduction of the number of challenges allowed, provision for special venires in important cases, and the amelioration of the conditions of jury service by treating jurors not like prisoners undergoing punishment, but as citizens performing an honorable public service.[1]

The progress of the trial after the selection of the jury is often unnecessarily hindered by slavish adherence to rules of procedure which are prolix, antiquated in many particulars, and honeycombed with technicalities which to a layman seem to have no other purpose than to delay judgment or provide loopholes of escape for criminals. Indictments which are not loaded down with meaningless verbiage, and which do not go into an absurd degree of particularity, — which, in short, do not conform in the minutest detail to the technical requirements of the "sacred" forms of procedure, are quashed. Every prosecuting officer knows how difficult it is, on account of the insistence of the courts upon technical accuracy, to frame an indictment that will be sustained.[2] Not infrequently ingenious

were fond of music, whether they believed in theatergoing, whether they were prejudiced against city people, whether any of their families were ever hurt in a fire, what newspapers they had read, etc.

[1] It is not strange that a man who is confronted by the prospect of being dragged away from his home and business and kept in a state of virtual imprisonment for weeks and months should profess prejudice or exaggerate possible sympathies in order to escape the hardships incident to such service. State's Attorney Healy, of Chicago, recently stated the matter correctly when he declared that the tendency of the professional and business man to avoid jury service is due to the failure of the law to provide a more expeditious procedure for the trial of cases. That the amelioration of the conditions of jury service would diminish the difficulties of impaneling juries was shown in the second Shea trial, when Judge Kavanagh announced that jurors would be treated more humanely, and that instead of being locked up like prisoners, they would be treated with the consideration due citizens performing a public duty. With this assurance the selection of the jury proceeded at a rate which, as compared with the first trial, was expeditious enough.

[2] Reversals have been granted for the omission or inclusion of qualifying words or even the abbreviation of the name of the state in whose name the indictment is brought. A recent

counsel who have hopeless cases refrain from demurring to indictments which they know to be technically faulty in order that they may move for new trials in case their clients are convicted. If the indictment is sustained, there is always a probability that the case will be postponed, when called, on account of the unpreparedness of counsel, the absence of material witnesses, or similar causes. Every one has known of notorious cases to be continued until finally the popular demand for prosecution subsided, and the state's attorney, through sheer worry or lack of interest, dropped the case and turned the criminal loose. Here, as in other respects, the English procedure is an improvement upon that followed generally in the American states. Except for sickness, evidence of which must be produced in writing, an English judge will not permit continuances or adjournments. No request to have a case stand over or to go to the next term merely for the convenience of counsel, says a prominent London barrister, would be listened to.[1]

The progress of the trial is frequently unnecessarily delayed by the method of examining witnesses[2] and by protracted arguments over questions concerning the admissibility of evidence. It is a common complaint against our method of criminal procedure that too much time is wasted over technical objections to evidence. Here again the English practice of forbidding long-drawn-out arguments on such questions might well be followed in the United States. Justice Ingraham of the New York supreme court says:

> I have heard cases tried in England quite a number of times, both at the Assizes and in London, and I do not think I ever heard five minutes given during a trial of a case to the discussion of questions of evidence. I have seen case after case go through without the question of evidence being raised at all.[3] This is a reform which any judge who has the proper conception of his duty may introduce without exceeding his legal authority.[4]

instance of the difficulty experienced in framing an indictment free from technical flaws was afforded by the case of Senator Burton, of Kansas, who was charged with improperly accepting a retainer for the use of his influence before the Post Office Department. Three successive indictments were drawn, one of which was quashed because of a mere variation as to where the money was received,— whether at Washington or Kansas City,— a fact which had no relation to the guilt or innocence of the accused, and which might well have been considered as immaterial. The state's attorney barely succeeded in drawing a good indictment before the statute of limitations began to run against the case.

[1] Letter of Mr. Crane to Mr. Choate, cited above.

[2] Justice Brown suggests that the progress of the trial might often be facilitated by requiring counsel to stand while examining witnesses and by prohibiting them from taking notes (*Green Bag*, Vol. XVII, p. 625).

[3] Testimony before New York Commission on the Law's Delay, p. 247.

[4] Judge Kavanagh, in the second Shea trial, moved apparently by the complaint which had been made against the conduct of the judge who tried the first case, for permitting counsel to spend entire days in arguments and wrangles, and deeply impressed, as he says, by the results of some personal observations of the procedure of the English courts during the preceding summer, announced to counsel that they would not be permitted to delay the trial as before, but that points raised on the admissibility of certain evidence would be decided by the court without argument.

The progress of criminal trials in England is further facilitated by a procedure which is simple and expeditious, and which relieves the trial court of the preliminary work of preparing the case for trial. In the beginning the case is taken in hand by a master who whips it into shape and engineers it through the preliminary stage, after which a trained barrister takes it in charge and it is quickly disposed of by the court. Thus the time of the judge is never wasted in hearing applications, interlocutory motions, and other matters which may as well be disposed of out of court, thus leaving the court nothing to do but try the case. The English system of pleading has in late years been freed from technicalities, so that not only has the evil of retrials been greatly reduced, but the ability of the courts to dispatch business has largely increased.[1] Concerning the efficiency of the English procedure and the reasons for its superiority over that in the American states, Justice Brown, recently retired from the supreme court, has this to say:

> One who has watched day by day the practical administration of justice in an English court cannot but be struck by the celerity, accuracy, and disregard of mere technicalities with which business is transacted. One is irresistibly impelled to ask himself why it is that, with the reputation of Americans for doing everything, from the building of bridges over the Nile or battleships for Russia and Japan, to harvesting, reaping, plowing, and even making butter by machinery, faster than other people, a court in conservative old England will dispose of half a dozen jury cases in the time that would be required here for dispatching one. The cause is not far to seek. It lies in the close confinement of counsel to the questions at issue and the prompt interposition of the court to prevent delay. The trial is conducted by men trained for that special purpose, whose interest is to expedite and not to prolong them. No time is wasted in immaterial matters. Objections to testimony are discouraged, rarely argued, and almost never made the subject of exception. The testimony is confined to the exact point in issue. Mere oratory is at a discount. New trials are rarely granted. A criminal trial especially is a serious business, since in case of a verdict of guilty it is all up with the defendant, and nothing can save him from punishment but the pardoning power of the home secretary. The result is that homicides are infrequent, and offenders rarely escape punishment for their crimes.[2]

One of the most common causes for the breakdown of criminal justice is found in the workings of the jury system in the form in which it exists

[1] Every well-informed lawyer and judge who testified before the New York Commission on the Law's Delay commended the efficiency of the English courts. T. Newton Crane declared that the "promptness and dispatch" with which they tried cases was "quite incredible to the patient New York lawyer who was accustomed to wait three years for the first opportunity to try a jury case. Justice Friedman, of New York, stated that the "results in England were truly great," and others gave similar opinions (Report, pp. 77, 277). The English master of judicial statistics, in a letter to Ambassador Choate under date of April 16,1903, stated that twenty-three judges sitting at London handle all the litigation of England and Wales, with a population of over 32,500,000, and that they actually try and determine an average of 5600 cases a year, or more than twice as many as are tried by forty-three judges in New York and Kings counties (Report of Commission on Law's Delay, pp. 76, 106).

[2] *Green Bag*, Vol. XVII, p. 624.

in America. This is due mainly to the practice by which the jury is exalted at the expense of the judge and a unanimous verdict required to convict. There is still a disposition, as in Blackstone's day, to worship the jury as a sort of fetish and to regard the judge with a kind of superstitious terror, although nearly everywhere the judges are popularly elected for definite terms. In some states this feeling is so deep-rooted that juries are, by the constitution, made judges of the law as well as of the fact,[1] and practically everywhere they are forbidden to even listen to suggestions from the court concerning questions of fact. As Judge Grosscup well says, the American judge is practically not allowed to take part in the trial of cases. His position is rather that of an umpire or moderator than of a judge in any real or vital sense. He may listen to applications of various kinds and make rulings or motions, but he cannot comment on the evidence, or review the facts, sifting out the material from the immaterial, and putting them before the jury in intelligible and coherent form. It matters not how much counsel may confuse and mislead the jury by their arguments, the judge cannot set them right before giving the case into their hands. Secretary Taft in a recent address complained of the position of impotency to which American judges have been reduced, and advocated the restoration to them of some of the powers which English judges enjoy at common law, especially if the unanimity rule as to verdicts is to be retained.

The weakest point in the jury system is the rule requiring unanimous verdicts to convict. Although time-honored, there have always been some to see the absurdity of the rule. Hallam, in his "Middle Ages," called it a "preposterous relic of barbarism"; Jeremy Bentham and Francis Lieber inveighed against it, and Judge Cooley, in his edition of Blackstone, declared that the rule was "repugnant to all experience of human conduct, passions, and understandings," and asserted that "it could hardly in any age have been introduced into practice by a deliberate act of the legislature." Justices Miller and Brown, of the United States Supreme Court, and ex-Judge William H. Taft are all on record as favoring a modification of the rule. Justice Ingraham, of the New York supreme court, has suggested the possibility of adopting a rule making a verdict by three fourths of the jury sufficient to convict, subject to the approval of the presiding judge.[2] Nowhere on the continent of Europe does the unanimity requirement prevail. In Germany, Austria, and Portugal a verdict may be returned by two thirds of the jury; in France and Italy by a bare majority; and in the Netherlands, where crime is almost

[1] This is true in Illinois. A bill to limit the power of juries to the determination of questions of fact is now before the Illinois legislature. It was drawn by ex-Judge Stein, of Chicago, and has been recommended by the supreme court, which is required by the constitution to study defects in the laws and suggest such alterations as it may think proper.

[2] Report of New York State Commission on the Law's Delay, p. 256. Judge Gibbons, of Chicago, recently, in a letter to the Board of Cook County Commissioners, recommended the abolition of the unanimity requirement and the substitution of a rule making a verdict by three fourths of the jury sufficient to convict.

nonexistent, trial by jury does not prevail at all. In Scotland, curiously enough, a unanimous verdict is required to convict in civil cases, while a two-thirds verdict suffices in criminal cases. In England the unanimity rule still prevails, but juries are never empowered, except in libel cases, to pass on questions of law; and in determining questions of fact they are so much under the control of the court that many of the abuses which result from jury trials in the United States are avoided. The theory upon which the unanimity rule rests is that twelve men may be found who will take the same view of a disputed fact, that the balance of each juror's mind can be struck in the same direction, that all are able to feel the same cogency of proof, and that no one can be drawn to a conclusion different from that at which his fellows have arrived.[1] It is needless to say that such conditions are rarely present in the minds of twelve men picked up at random from the community. The result is that in many cases the unanimity is apparent and not real. Every one is familiar with cases in which a single juror has set at naught the opinions of eleven, — has, by sheer obstinacy and power of physical endurance, compelled his associates to return verdicts which did not represent their real convictions, or driven them to disagreements, in either case defeating justice. The unanimity rule gives too much power to one man. It virtually places the protection of the community in the hands of a single individual, who is often selected without regard to mental or moral qualification.

It is well known that verdicts are often compromises. The hard lot of the juror who is kept away from his home and business often tends to drive him to yield a few points and ultimately to sacrifice his real conviction in order to escape from the discomforts and hardships incident to jury service in protracted cases. In many of the American states the unanimity requirement in the trial of civil cases has been dispensed with, and in a considerable number of states the jury may be waived altogether with the consent of the parties. Likewise in a number of states the constitution permits verdicts to be returned by less than twelve jurors in cases involving misdemeanors, and in several (Louisiana and Montana, for example) a verdict by two thirds of the jury may suffice for conviction in all cases not amounting to felony. Everywhere there is evidence of increasing dissatisfaction with the results of the unanimity rule.

One of the principal weaknesses of the jury system is the rule which requires the jury to be satisfied beyond a reasonable doubt of the guilt of the accused before returning a verdict of conviction. As if this were not enough, we not infrequently find the courts delivering instructions to juries to give the "most charitable and merciful construction" to the facts. This rule, together with the sacrosanct interpretation given to the doctrine of presumed innocence, — a presumption which, as Dean Huffcut well observed, is raised by some courts to the value of actual proof of innocence, — enables a large proportion of criminals to escape punishment.

[1] Compare Forsythe, Trial by Jury, p. 205.

Both rules are no doubt the means of occasionally saving an innocent man, but by weakening public confidence in the courts and encouraging crime they have caused the death of many times the number of those whom they have judicially shielded.[1] The rule as to reasonable doubt should be abolished and the jury required to convict when satisfied by a fair preponderance of the evidence of the guilt of the accused.

The most prolific source of the law's delay is the American practice of allowing appeals almost as a matter of course, and of reversing the decisions of lower courts upon technical errors and granting new trials to criminals who have already been convicted. The rule also contributes powerfully to the encouragement of litigation, and so frequently ends in flagrant miscarriages of justice as to impair seriously the public confidence in our present system of criminal justice. Justice Brown hardly exaggerated the fact when he said that, according to American procedure, the rendering of the verdict is only the beginning of the trial in serious criminal cases. The supreme-court reports of all our states are full of cases illustrating the truth of Justice Brown's statement. Judge Everett P. Wheeler, in an article in the *Columbia Law Review*,[2] cites the case of a negro desperado in New York who had been tried three times for the same murder, and while awaiting his fourth trial, escaped and was shot in December, 1900, while resisting arrest. He quotes the New York *Times* of July 16, 1903, for an account of the lynching of a murderer who had been twice found guilty by the unanimous verdict of a jury and twice granted new trials on technical grounds. After the third conviction he was lynched by a mob composed of the citizens of the community, who doubtless feared that a fourth trial would follow, ending in the acquittal of the criminal. A somewhat similar case was the lynching of a murderer at Tallulah, Louisiana, last summer. After having been convicted and sentenced to death, the supreme court reversed the decision of the lower court on a technicality and ordered a new trial. The second trial was interrupted by the death of a member of the judge's family, and when the third trial was begun, the plea of "double jeopardy" was set up, whereupon the case was sent up to the supreme court for a ruling on this point. At this juncture, two years and three months having elapsed since the offense was committed, the citizens, disgusted at the attempt to punish by due process of law a murderer concerning whose guilt there seems to have never been any doubt, took the law into their own hands and inflicted the punishment themselves. Such cases remind us that there may be an element of truth in Goldwin Smith's dictum that there are communities in the United States where lynch law is better than any other. Dean Huffcut, in an address on the Administration of the Criminal Law, delivered at Cornell University on December 6 last, referred to a murder case which had been tried substantially three times,

[1] On this point compare the opinion of Everett P. Wheeler, in *Columbia Law Review*, Vol. IV, p. 356.

[2] Vol. IV, p. 360.

and which had lately been disposed of, more than seven years after the offense was committed.[1] The first trial had failed near its close by the illness of a juror; the conviction upon the second trial had been set aside by the court of appeals for error; upon third trial he was again convicted, and the judgment was sustained by the court of last resort. The Chicago papers some time ago gave an account of a personal-injury case that had been up to the supreme court four times and was then getting ready for its fifth journey to Springfield. Instances like these might be multiplied indefinitely. They are extreme cases, it is true, but they are not rare, and they illustrate a growing, not to say intolerable, evil in our judicial procedure.

The pernicious American doctrine that error in the procedure of the trial court shall be presumed to have affected prejudicially the rights of the defendant, and the practice of appellate courts in granting new trials, even when it can be affirmatively shown that the error complained of was immaterial, are doing more than anything else to multiply appeals, diminish popular confidence in the courts, and thwart justice. The following are some of the grounds actually assigned by appellate courts for reversing the convictions of lower courts and allowing new trials: because the indictment contained the name of the state in abbreviated form; because the word "feloniously" was omitted from the indictment, although the evidence showed that the crime was committed feloniously; because the words "person or human being" were omitted from the indictment; because it did not appear from the record of the trial court that the accused had been arraigned and pleaded (as if he could have been tried without being arraigned and without pleading); because the jury reached a verdict on Sunday; because the defendant was allowed to offer evidence as to his good reputation for honesty and integrity, but not for truth and veracity (thus assuming that the jury might not believe the testimony as to the former, but might believe it as to the latter); because the judge was absent from the trial three minutes; because witnesses were allowed to testify that at the time of the murder bystanders shouted "fire," "murder," etc., all of which were prejudicial to the right of the accused; because the words "on oath" were omitted from the indictment; because the officer who summoned the jury was not specially sworn; because the evidence on which a notorious robber was convicted failed to show whether the stolen goods were in coin or bills; because evidence was admitted regarding former crimes committed by the accused, etc.[2] This list is taken from actual cases and might be multiplied indefinitely if it were thought necessary. Some of the instances of the enforcement of the rule of presumed prejudice regarding error in judicial procedure, says Dean Wigmore, one of the leading authorities on the law

[1] For reference to a number of similar cases, see an article by Nathan Smyth, in the *Harvard Law Review*, Vol. XVII, p. 321.

[2] Compare an article by George W. Alger, in the *Atlantic Monthly*, Vol. XCVII, p. 502.

of evidence, would seem incredible even in the justice of a tribe of African fetish worshipers. The exaggerated form which it takes in America tends to reduce the trial to a mere contest over errors rather than a serious quest for justice, — a sort of game which the clever lawyer who has no case on the merits seeks to play in such a way as to entrap the court into committing an error which will form the basis of a new trial. In the ordinary course the judge is requested to charge the jury on certain propositions. If he refuses and the accused is convicted, a bill of exceptions follows and the case is appealed. In some states, if the judge neglects to charge the jury on every point involved in the case, the defendant, if convicted, is entitled to a new trial. If he errs in his statement regarding the applicability of the law, he lays the basis for a new trial. If he permits the introduction of certain evidence, even though it is improper, merely because of its logical irrelevancy, and should be excluded only for the purpose of saving time, the presumption is that it affects prejudicially the case of the defendant, and he is entitled to a new trial. Likewise, where the court admits hearsay evidence, the presumption is that the jury are incapable of weighing and discounting it, although perfectly capable of weighing and estimating the value of material evidence, and hence the admission of such evidence is treated as a fatal error. Thus the judge is surrounded on every side by pitfalls set by ingenious counsel, and in the trial of great criminal cases there are few who are able to pass the ordeal without falling into at least one of the traps thus set.[1]

The practice of allowing new trials upon trifling errors has become an evil so serious as to bring our system of criminal justice into great disrepute. A committee of the American Bar Association, after an investigation of the subject in 1887, reported that new trials were granted in 46 per cent of all cases brought under review in the appellate courts of this country. The Commission on the Law's Delay, created by the authority of the legislature of New York in 1903, found that the proportion in that state was 42 per cent.[2] Upon examination of the supreme-court reports of Illinois, covering the years 1903–1905, I found the proportion in this state to be about 40 per cent, fifteen of the twenty-five criminal cases reversed being upon errors which could hardly be considered as substantial in the sense that they could be shown affirmatively to prejudice the rights of the accused. A large proportion of the reversals were founded upon errors of practice and procedure, and related principally to faulty indictments and the admission or exclusion of certain evidence. A similar examination of the Wisconsin reports showed the proportion of reversals to be about 30 per cent of the total number of appealed cases. A comparison of these figures with those furnished by the master of judicial statistics in England affords striking evidence of the widely different attitude taken by the English appellate courts toward the question of error. In the year 1900, of

[1] *Atlantic Monthly*, Vol. XCVII, p. 502. [2] Commission on Law's Delay, p. 246.

337 cases appealed from the high court of justice only 15 were remanded for retrial, and in 1904, of 555 cases reviewed by the court of appeal only 9 were remanded for new trials.[1] Federal Judge Amidon, of North Dakota, in an address before the Minnesota Bar Association last year, stated that he had personally examined the law reports of England, covering the period from 1890 to 1900, with the result that he found that of all the cases reviewed on appeal in that country new trials were granted in less than $3\frac{1}{2}$ per cent. It is a rule of the English procedure that no judgment or verdict of a lower court shall be disturbed or a new trial granted for error if there were sufficient evidence to justify the judgment or verdict, or if evidence erroneously excluded would not, in the opinion of the appellate court, have changed the result if it had been admitted. In other words, judgment is rendered on the merits of the case, and not on mere considerations of technical error in the record or upon questions collateral thereto. Instead of presuming that error in the trial below is prejudicial to the defendant, the presumption is that it is harmless, and it is incumbent upon the appellant to show the contrary.

One of the results of the strict enforcement of this rule by the English appellate courts is a reduction in the number of cases appealed. A defeated party who has no case on its merits can have no incentive to take an appeal. He knows well that there is no chance of securing a reversal upon immaterial errors of the court below. The consequence is that not more than one case in ten is appealed from the high court, whereas in New York state it is said that on an average 33 per cent of the cases tried in the first department of the supreme court are appealed.[2] The English procedure does not allow a bill of exceptions to be filed and argued. If there is dissatisfaction with the verdict or judgment, application may be made to the appellate court in writing, accompanied by copies of the pleadings and evidence made from stenographic reports.

Moreover, the English appellate judge has all the powers of the trial judge, and he may make any order or judgment which ought to have been made by the trial court. If by reason of error below a wrong judgment was entered, the appellate court may enter the judgment which justice requires instead of sending the case back for retrial upon errors which were not clearly prejudicial to the right of the accused. In other words, the English appellate courts proceed on the principle that it is their business to administer justice as well as the law, — a sensible rule, which originally existed at common law, but, like many of the other common-law rules of legal procedure, has been changed by statute or custom.

[1] Letter of T. Newton Crane to Ambassador Choate, cited above (N. Y. Commission on Law's Delay, p. 112).

[2] Report Commission on Law's Delay, pp. 34, 76, 246. In all England in 1903 there were only 1272 cases appealed to the higher courts, while in two departments of the New York appellate division (New York City and Brooklyn) there were 2952 appeals.

It is gratifying to note that a beginning is being made in some of the states toward reforming the abuses of appellate procedure. Thus the code of criminal procedure of New York (Section 542) declares that in capital cases the appellate court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties; and under the practice of the court of appeals the obligation rests on the appellant to show that the error complained of was prejudicial, that is, that but for the error the result would have been different. The same principle has been embodied in the new law for the establishment of the Chicago municipal court. This law provides that no order or judgment of the municipal court shall be reversed by the appellate court or the supreme court unless they shall be satisfied that the order or judgment was contrary to law and the evidence, or resulted from substantial errors directly affecting the matters at issue. Moreover, the appellate court is empowered to enter such order or judgment as, in its opinion, the municipal court ought to have entered, instead of sending the case back for retrial. There seems to be no good reason why the rule in New York should not be extended to cover the review of other than capital cases, and that the rule in Illinois should not apply to cases appealed from other than the municipal court of Chicago.

It is the testimony of the best lawyers and jurists throughout the country that the interests of justice and social order require a restriction of the right of appeal to more reasonable limits. Justice Gaynor, of New York, in his testimony before the Commission on the Law's Delay, stated the matter tersely when he declared that appellate courts review too many things, and that in our present procedure "appeals have come to be pretty nearly the principal thing."[1] Attorney Hirschberg, testifying before the same commission, asserted that the great difficulty with our procedure was that it is "distinctly an appellate system," that it is based upon the "fundamental idea that a trial and a decision are always wrong," and that as a result of the opportunities thus afforded the temptation to indulge in litigation is vastly enhanced.[2] To the same effect was the opinion of Justice O'Gorman, who stated that nearly every defeated party was willing to take a chance of securing a reversal on appeal, and that they had every encouragement to do so.[3] Dean Huffcut, in an address already referred to, declared that the remedy for the evil described was to provide that any appeal not brought on for hearing within six months after it is taken, should be stricken from the files, and that in addition it should be provided that no case should be reversed unless it is affirmatively shown upon the whole record that the error complained of has been prejudicial to the defendant and has resulted in a miscarriage of justice. If this were done, he declared, appeals would not only be fewer in number, but would also be more speedily pressed

[1] Report Commission on Law's Delay, p. 267. [2] Ibid., p. 269. [3] Ibid., p. 319.

and with smaller chance of success.[1] President Roosevelt in his last annual message strongly recommended the incorporation of this rule into federal procedure, and bills for its introduction into state procedure are now before the legislatures of a number of states. The want of it is, as a well-known jurist has observed, more responsible than any other one cause for the courts which are conducted by Judge Lynch.[2] It is the American practice to allow appeals as a matter of course, with little regard to the merits of the case. This privilege should be limited, as in England, to cases where the trial judge in his discretion reserves for review by the higher court some question of law which he considers doubtful and has decided adversely to the defendant.[3] It is no infringement upon the right of any person who has been convicted by the unanimous verdict of a jury chosen from his neighborhood, to say that he shall not be given another chance to establish his innocence, unless it can be affirmatively shown that substantial justice was not done in the first trial. The present wide latitude of appeal, although in theory open to all, is in fact practically closed to the poor litigant on account of the expense involved. The rule thus operates to the great advantage of the well-to-do litigant by opening an avenue of possible escape which is in practice denied to the man without means. It is a common saying which is becoming truer all the time, that the rich criminal with unlimited means at his disposal can, through the process of appeals and new trials, escape the punishment which he deserves and which he would receive if he were a poor man.[4] Any system of criminal justice which makes possible any such inequality in the administration of the criminal law is fundamentally wrong in principle and dangerous in practice. It not only encourages lawlessness among the upper classes, but impairs the confidence of the lower classes in the courts and promotes the spirit of lynch law and anarchy among them. Some valuable lessons might well be learned by our legal reformers from the English and continental practice. It has not been very many years since England was agitated over the situation arising from the virtual breakdown of her judicial machinery, but they set about in a quiet way to make improvements, with the result that they have brought their judicial system up to a plane of efficiency which has not yet been attained in any American state. The New York State Commission on the Law's Delay reported that it had been "profoundly impressed" by the character and results of the English procedure,

[1] Ithaca *Evening Journal*, December 6, 1906.
[2] *Michigan Law Review*, Vol. III, p. 262.
[3] Compare Smyth, "The Abuse of New Trials," *Harvard Law Review*, Vol. XVII, p. 317.
[4] Speaking on this point to the students of Cornell University, Ex-President Andrew D. White recently said: "While the number of murders is rapidly increasing, the procedure against them is becoming more and more ineffective, and, in the light of recent cases in New York and elsewhere, is seen to be a farce. One of the worst results of these cases is the growing opinion among the people at large that men with money can so delay justice by every sort of chicanery that there is a virtual immunity from punishment for the highest crimes."

and declared that the English courts, from having been the most dilatory in the world, had become in recent years the most expeditious, and expressed the opinion that we "could not do better than adopt some of these modern methods of procedure which have been so thoroughly tested in England and have proven to work so well." [1]

The English have largely freed their procedure from technicalities, have simplified and made it less cumbersome and expensive, have raised the judge to a more commanding position in the conduct of the trial and assigned the jury its true place, have abolished the doctrine of presumed error, restricted the privilege of appeal to more reasonable limits, and in various other ways provided a procedure which, to an American lawyer accustomed to the delays and uncertainties of our system, seems wonderful indeed.[2] The procedure of the German courts since the adoption of the imperial codes presents many features analogous to that of England. There are no technicalities in pleading; the judge participates in determining what shall be proved, and when and in what manner the proof is to be made; the rules of evidence are simple, trials are promptly started and rapidly expedited, and criminals are punished with a degree of certainty unknown in America.[3] In France, likewise, the criminal law is administered in a way which serves as an effective deterrent of crime, and secures general respect for law and authority.

Before we may hope for a thoroughgoing reform of the American system there must be an entire change of attitude upon the part of the people with regard to the enforcement of law, the rights of the community as against criminals, and the purpose of judicial punishment. The bench and bar must also take a more common-sense view of the whole question of the fundamental purpose of a judicial trial. There must be less disposition to subordinate substantive justice to mere matters of practice. It is also worth considering whether the time has not come when some of the presumptions of our law should not be resolved in favor of the community rather than in favor of the criminal, and whether we should not act more upon the principle that the primary purpose of a system of criminal justice is to protect the innocent members of society rather than the criminal class. Our present methods had their origin in an age when the number of capital crimes was appallingly large, and when offenders were disproportionately punished for minor offenses. To make it difficult to punish persons charged with crime in such an age a

[1] Report Commission on Law's Delay, pp. 32, 34.

[2] The New York Commission on the Law's Delay, speaking of the English system, declared that "it has undergone many important changes in practice to meet the requirements of modern social and business conditions in England, and that much of our own practice, time-honored and tolerated because 'made in England,' has been displaced by more modern methods of procedure, and is obsolete in the land from which it came, — changes which have worked havoc with many venerable notions and reversed precedents to which our American courts fondly cling" (p. 75).

[3] Compare an article by Rudolf Dillon in the Twenty-fifth Annual Report of the New York State Bar Association.

procedure was developed which provided every possible loophole of escape for the accused. The old severity of penal legislation, however, has long ago been abolished, yet the old methods of procedure, with all the safeguards which they threw around the criminal, are still retained. They are totally inapplicable to present conditions, and in the interest of real justice as well as social security they ought to be modified as they have been in England, where they originated. Our duty in the premises was well stated by President Roosevelt in a letter to Governor Durbin of Indiana in August, 1903. He said:

> The best and immediate efforts of all legislators, judges, and citizens should be addressed to securing such reforms in our legal procedure as to leave no vestige of excuse for those misguided men who undertake to reap vengeance through violent methods. We must show that the law is adequate to deal with crime by freeing it from every vestige of technicality or delay.

THE JUVENILE COURT[1]

By Julian W. Mack

Most of the children who come before the court are, naturally, the children of the poor. In many cases the parents are foreigners, frequently unable to speak English. These poor people have not been able to give to their offspring the opportunities and the supervision that many children enjoy. The parents often do not understand our American methods and views. What they need, more than anything else, is kindly assistance; and the aim of the court in appointing a probation officer for the child is to have the child and the parents feel not so much the power as the friendly interest of the state; to show them that the object of the court is to help them to train the child right; and therefore the probation officers must be men and women fitted for these tasks.

Their duties are oftentimes of the most delicate nature. Tact, forbearance, and sympathy with the child, as well as a full appreciation of the difficulties that the poorer classes, and especially the immigrants, are confronted with in our large cities, are indispensable. The New York Probation Commission say, in their second annual report for the year 1908, p. 32:

> In courts where the probation system is most effectively conducted there is great variety in the work done by probation officers. The most successful workers regard the receiving of reports from probationers as much less important than the visiting and other work done by the probation officers. The probation officers obtaining the best results enter into intimate friendly relations with their probationers, and bring into play as many factors as possible, such as, for instance, securing employment for their probationers; readjusting family difficulties; securing medical treatment or charity, if necessary; interesting helpful

[1] From a paper before the American Bar Association, 1909.

friends and relatives; getting the coöperation of churches, social settlements, and various other organizations; encouraging probationers to start bank accounts, to keep better hours, to associate with better companions, and so forth.

Mr. Homer Folks, chairman of this commission, and perhaps the leading authority in the country on child-saving work, put the matter well when he said (Conference of Charities and Correction, 1906, p. 117):

It is the personal influence of the probation officer, going into the child's home, studying the surroundings and influences that are shaping the child's career, discovering the processes which have been exercising an unwholesome influence, and, so far as possible, remedying these conditions, — this is the very essence of the probation system. The friendly side of the probation officer's work is its important side. His duty is by no means simply that of securing information for the court as to the child's conduct, but that of securing reformation. He is not to be a dispassionate observer, but an active influence. Without such work on the part of probation officers, without probation officers qualified to conduct such work and to carry it on consistently and without intermission, the court is practically helpless. . . .

The probation system is really a new way of treating offenders. It provides a new kind of reformatory, without walls and without much of coercion, but nevertheless seeking to bring to bear upon each child the influences which will make for his betterment, and seeking to provide for him, so far as possible in his own home, opportunities and facilities for education and discipline, which we have heretofore provided only in an institution. . . .

The work of the probation officers must therefore begin, if it does not begin earlier, the very moment the child leaves the court. It must utilize to the fullest degree whatever advantages there are in the shock caused by apprehension of the child, by the court proceedings, and the judge's counsel. It must, by force of personal influence and in whatever ways may be possible, build up a strong influence in the home of the child.

While the paid, trained worker is to-day recognized as essential in all fields of philanthropy, nevertheless, to obtain the fullest measure of success, the active coöperation of the charitably inclined, as volunteer assistants, must be secured, particularly in our large cities where the authorities have been disinclined to provide for a sufficient number of paid probation officers, with the result that there are frequently assigned from one to two hundred cases to the officer of a district, far too many for one man or woman to care for thoroughly.

If for every boy and girl that comes into court there can be found one real friend, imbued with the spirit of human brotherhood, — a phrase that passes our lips so readily, but is achieved in the lives of so few of us, — willing to give not that which is so easy for any one who has a surplus above his needs, money, but that which is hardest for most of us to part with, our time, our thought; who will occasionally take the lad into his own home, or with his own boys to the ball game or to the theater; who will help him to find a job, who will be genuinely

interested in him and in seeing that his father and his mother do their duty toward him, the problems of the court will be well-nigh solved.

In a number of communities juvenile-court committees have been formed by public-spirited citizens for the purpose of conferring with the probation officers, assisting in and coördinating their work, helping the judge, and, where the public authorities fail to provide paid probation officers, supplying the necessary funds. In this way the probation officer is not left to his or her unaided judgment and effort in the performance of these most difficult and delicate tasks. Moreover, supervision is secured for the work, and the danger of its running into ruts and becoming perfunctory is checked.

Just a few words about the actual court procedure and practice. In the first place, the number of arrests is greatly decreased. The child and the parents are notified to appear in court, and unless the danger of escape is great, or the offense very serious, or the home totally unfit for the child, detention before hearing is unnecessary. Children are permitted to go on their own recognizance or that of their parents, or on giving bail. Probation officers should be and often are authorized to act in this respect. If, however, it becomes necessary to detain the children either before a hearing or pending a continuance, or even after the adjudication, before they can be admitted into the home or institution to which they are to be sent, they are no longer kept in prison or jails, but in detention homes. In some states the laws are mandatory that the local authorities provide such homes, managed in accordance with the spirit of this legislation. They are feasible even in the smallest communities, inasmuch as the simplest kind of building best meets the need. In this building the court may be held, as is done in some of the larger cities.

The jurisdiction to hear the cases is generally granted to an existing court having full equity powers. In some cities, however, special courts have been provided, with judges devoting their entire time to this work. If these special courts can be constitutionally vested with full and complete chancery and criminal jurisdiction, much is to be said in favor of their establishment. In the large cities particularly, the entire time of one judge may well be needed. It has been suggested from time to time that all of the judges of the municipal or special sessions courts be empowered to act in these cases; but while it would be valuable in metropolitan communities to have more than one detention home, more than one courthouse, nevertheless it would seem to be even more important to have a single juvenile-court judge. The British government has adopted this policy for London. Mr. Herbert Samuels stated (Hansard, 4th ser., Vol. 186, p. 1298) during the debate on the Children's Act:

> It is impossible to bring all the children, witnesses, parents, probation officers, and other persons concerned into one central court. The best course will be to establish four places of detention in different parts of London. . . . I hope it will be practicable in these places to provide rooms, without any

additional cost, or very small additional cost, which can be used as courthouses. The children's magistrate could visit in turn these four houses. . . . The result would be that a certain number of children would be kept over night sometimes, when they could not be released on bail; but all those that I have consulted agreed . . . it is better to keep, if necessary, a small number of children in detention for one night than to forego the great benefit of having a special magistrate to deal with these cases.

By the Colorado Act of 1909 provision is made for hearings before masters in chancery, designated as masters of discipline, to be appointed by the juvenile-court judge and to act under his direction. This may prove to be the best solution of a difficult problem, combining, as it does, the possibility of a quick disposition of the simpler cases in many sections of a large city or county, with a unity of administration through the supervisory power of a single judge.

The personality of the judge is an all-important matter. The supreme court of Utah, in the case of Mill *vs.* Brown, supra, commenting upon the choice of a layman, a man genuinely interested in children, pointed out that:

To administer juvenile laws in accordance with their true spirit and intent requires a man of broad mind, of almost infinite patience, and one who is the possessor of great faith in humanity and thoroughly imbued with that spirit.

The judge of any court, and especially a judge of a juvenile court, should be willing at all times not only to respect, but to maintain and preserve, the legal and natural rights of men and children alike. . . . The fact that the American system of government is controlled and directed by laws, not men, cannot be too often or too strongly impressed upon those who administer any branch or part of the government. Where a proper spirit and good judgment are followed as a guide, oppression can and will be avoided. . . .

The juvenile-court law is of such vast importance to the state and society that it seems to us it should be administered by those who are learned in the law and versed in the rules of procedure, to the end that the beneficent purposes of the law may be made effective and individual rights respected. Care must be exercised in both the selection of a judge and in the administration of the law.

The decision but emphasizes the dangers that beset the path of the judge of the juvenile court. The public at large, sympathetic to the work, and even the probation officers who are not lawyers, regard him as one having almost autocratic power. Because of the extent of his jurisdiction and the tremendous responsibility that it entails, it is, in my judgment, absolutely essential that he be a trained lawyer, thoroughly imbued with the doctrine that ours is "a government of laws and not of men."

He must however be more than this. He must be a student of, and deeply interested in, the problems of philanthropy and child life, as well as a lover of children. He must be able to understand the boy's point of view and ideas of justice; he must be patient and willing to search

out the underlying causes of the trouble and to formulate the plan by which, through the coöperation, ofttimes, of many agencies, the cure may be effected.

In some very important jurisdictions the vicious practice is indulged in of assigning a different judge to the juvenile-court work every month or every three months. It is impossible for these judges to gain the necessary experience or to devote the necessary time to the study of the new problems. The service should, under no circumstances, be for less than one year, and preferably for a longer period. In some of our cities, notably in Denver, the judge has discharged not only the judicial functions, but also those of the most efficient probation officer. Judge Lindsey's love for the work and his personality have enabled him to exert a powerful influence on the boys and girls that are brought before him. While doubtless the best results can be obtained in such a court, lack of time would prevent a judge in the largest cities from adding this to his strictly judicial duties, even were it not extremely difficult to find the necessary combination of elements united in one man.

The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but, What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career? It is apparent at once that the ordinary legal evidence in a criminal court is not the sort of evidence to be heard in such a proceeding. A thorough investigation, usually made by the probation officer, will give the court much information bearing on the heredity and environment of the child. This, of course, will be supplemented in every possible way; but this alone is not enough. The physical and mental condition of the child must be known, and it is therefore of the utmost importance that there be attached to the court, as has been done in a few cities, a child-study department, where every child, before hearing, shall be subject to a thoroughly scientific psychophysical examination.

The relation between physical defects and criminality is a very close one. Take the boy suffering with adenoid growths, whose parents, through ignorance or neglect, know nothing about it; he can't breathe properly; his nerves are affected; he can't sit still; the schoolroom has too many pupils for one teacher (that is the trouble with all our public schools); a lack of harmony follows, — what is more natural than that that boy should play hooky? And truancy is often the first step toward a career of criminality. In hundreds and thousands of cases the discovery and remedy of defective eyesight or hearing or some slight surgical operation will effectuate a complete change in the character of the lad.

The child who must be brought into court should of course be made to know that he is face to face with the power of the state, but he should, at the same time, and more emphatically, be made to feel that he

is the object of its tender care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the little one at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

It is, however, of far greater importance to keep children out of any court than to bring them even into the juvenile court. In many communities the influence of the probation officers in their immediate surroundings has been such that they have become arbiters of the petty disputes and quarrels that in former years brought not only the children but their parents into conflict and into court.

The object of the juvenile court and of the intervention of the state is, of course, in no case to lessen or to weaken the sense of responsibility either of the child or of the parent. On the contrary, the aim is to develop and to enforce it. Therefore it is wisely provided in most of the recent acts that the child may be compelled when on probation, if of working age, to make restitution for any damage done by it. Moreover, the parents may not only be compelled to contribute to the support even of the children who are taken away from them and sent to institutions, but since the Colorado Act of 1903 they, as well as any other adults, may be made criminally liable for their acts or neglect contributing to a child's dependency or delinquency. In most of the jurisdictions which have established separate juvenile courts, as well as in some of the others, all criminal cases affecting children are tried by the juvenile-court judge. In drafting legislation of this kind, however, it must not be overlooked that if the proceedings against the adult are criminal, his constitutional rights must be carefully safeguarded. Following general principles, such penal acts are strictly construed, and therefore in the recent case of Gibson *vs.* People, 99 Pac. 333 [1909], the Colorado supreme court limited the application of the act of 1903 to the parents and those standing in a parental relation to the child. Colorado, in 1907, however, as well as several other states, expressly extended the scope of such statutes so as to include any person, whether standing *in loco parentis* or not. The supreme court of Oregon, in State *vs.* Dunn, 99 Pac. 278 [1909], construed such legislation to refer only to misconduct not otherwise punishable.

Kentucky in 1908, followed by Colorado in 1909, has enacted a statute drafted by Mr. Bernard Flexner, of Louisville, — one of the few prominent members of the bar who have taken a profound and active interest in the work of the juvenile court, and to whom I am greatly indebted for assistance in securing material for this paper, — providing for the enforcement of parental obligations not in the criminal but in the chancery branch of the juvenile court. A decree not merely for the

payment of support money, but for the performance or omission of such acts, as under the circumstances of the case are found necessary, may be enforced by contempt proceedings.

Valuable, however, as is the introduction of the juvenile court into our system of jurisprudence, — valuable both in its effect upon the child, the parents and the community at large, and in the great material saving to the state which the substitution of probation for imprisonment has brought about, — nevertheless it is in no sense a cure-all. Failures will result from probation just as they have resulted from imprisonment. As Judge Lindsey has said (Juvenile-Court Laws, etc., p. 23):

> It does not pretend to do all the work necessary to correct children or to prevent crime. It is offered as a far superior method to that of the old criminal-court system of dealing with the thing rather than the child. That method was more or less brutal. The juvenile-court system has a danger in becoming one of leniency, but as between this method and that of the criminal court it is much to be preferred. But the dangers of leniency as well as those of brutality can be avoided in most cases. Juvenile-court workers must not be sentimentalists any more than brutalists. In short, the idea is a system of probation work which contemplates coöperation with the child, the home, the school, the neighborhood, the church, and the business man in its interests and that of the state. Its purpose is to help all it can and to hurt as little as it can; it seeks to build character, — to make good citizens rather than useless criminals. The state is thus helping itself as well as the child, for the good of the child is the good of the state.

But more than this, the work of the juvenile court is, at the best, palliative, curative. We take these little human beings that are going the downward path and we try — and I think to some extent succeed — in saving them from going farther down. But that is not the most important task. The vital thing is to prevent them from reaching that condition in which they have to be dealt with in any court; and we are not doing our duty to the children of to-day, the men and women of to-morrow, when we neglect to destroy the evils that are leading them into careers of delinquency, when we fail not merely to uproot the wrong, but to implant in place of it the positive good.

It is well that we have these schools for the delinquent boy and girl; it is well that when they get into them they receive a thorough technical training, so that they are fitted for something afterwards. But it would be infinitely better if all children could receive that kind of an education before they reach the court; it would be infinitely better if we checked delinquency in its incipiency, and the incipiency generally is truancy.

To do this we must make the school interesting, — more interesting than it is to-day; we must provide for those children who cannot sit at their desk all day long with only mental work; we must put manual training right through the entire school system, so that there will be an outlet for their nervous energies, so that they will have something to

work on with their hands instead of merely with the brain; and we must have the physician and the nurse in the school. We must not wait until the physical or mental troubles produce a state of delinquency and are discovered by the physician connected with the court.

And then, what is to be expected of the boys if they are not given a proper place to play? If they are going to be driven into the streets, naturally they will come into contact with the policeman, naturally there will be trouble, and the heroism and hero-worship that follows trouble with the public authorities. And when that sort of heroism begins, they have stepped onto the highroad to criminality. How shall they be halted? By giving the boys and girls proper playgrounds, not only in our cities but in our towns and villages; by giving them the small parks with their swimming pools and their skating rinks and their assembly halls and their gymnasiums; by thus giving them a chance to convert the "gang," which can't be eradicated, — it is not human to go alone, the crowd is the natural thing, — to convert the "gang" into a team pulling together for good instead of working together for evil. That is the result that has been obtained wherever these small parks have been established, especially in the congested districts of the cities. The boys get what they need. The appeal is made to their manhood and their honor. In every community there are needed separate ungraded rooms for the backward children, vacation and night schools, proper child-labor and compulsory-education laws, above all a living wage for the worker, and many more things I should like to touch upon in this connection, had I the time.

Just one more point. The number of girls that go wrong in a large city is enormous. The majority of them do not start in from love of lust, but from love of joy, — the joy of life that is in every normal human being. Take the girl that is working all day long and then comes home to two or three rooms occupied by a large family in the slum districts that the city fails to keep clean; she does n't want to stay there every evening; she wants to go out; she wants that pleasure and happiness that our girls want, she likes the dance and the play just as much as do our girls. We let our girls enjoy themselves in a decent way under decent surroundings, but what do we do for these girls? The public dance hall offers them the joy and the lights and the pleasures; but if the good citizens of the town will offer them those joys, — those decent, innocent pleasures,— in a decent way and under proper influences, as do our settlements scattered throughout our large cities, and some of the churches, the girls will choose the latter nine times out of ten, aye ninety-nine times out of the hundred. But they must have some outlet for their energy, some satisfaction for this cry for joy and happiness, and if we do not give it to them, they will get it in another way.

In a number of communities juvenile protective leagues have been established to carry on this preventive work of seeing to it that conditions injurious to child life are remedied, that offenses against children are

punished, that the compulsory-education and child-labor laws, without which juvenile-court legislation is well-nigh worthless, are properly enforced; and to promote this constructive work of furnishing the largest opportunities for the full and complete development of a happy childhood.

I have touched upon some of the positive needs that mean so much in the growth of the child; through them may come the prevention of that delinquency for which the juvenile court offers merely a cure. And it is to a study of the underlying causes of juvenile delinquency, and to a realization of these preventive and positive measures, that we, the trained professional men, following the splendid lead of many of our European brethren, should give some thought and some care. The work demands the united and aroused efforts of the whole community, bent on keeping children from becoming criminals, determined that those who are treading the downward path shall be halted and led back.

To quote again from the debates on the Children's Bill in the House of Commons (Hansard, 4th ser., Vol. 186, p. 1262):

> We want to say to the child that if the world or the world's law has not been his friend in the past, it shall be now. We say that it is the duty of this parliament, and that this parliament is determined, to lift, if possible, and rescue him, to shut the prison door and to open the door of hope.

THE PAROLE LAW OF ILLINOIS[1]

By E. A. Snively[2]

The parole law was the outgrowth of the progressive and reformative views of those who believed that severe and unusual punishment would not reform men and women. It was the natural result of the same spirit which abolished the stocks and whipping post.

In this state it was first applied to the Illinois State Reformatory at Pontiac, where the definite sentence was abolished and the indeterminate sentence was substituted.

In 1895, upon recommendation of Governor Altgeld, the principle was applied to the Joliet and Chester prisons, and all persons convicted of a felony, except those convicted of treason, murder, and rape, were merely sentenced to the penitentiary with the proviso that they should serve the minimum sentence provided by law, but should not serve longer than the maximum. As the law did not take effect until July, 1895, and as there were few courts held until later in the fall of the year, there were but few persons convicted whose minimum expired prior to July, 1897. Under the act of 1895 the penitentiary commissioners were required to administer the parole law, but the legislature of 1897 amended the law so that this work fell to the Board of Pardons.

[1] Address before the Sangamon County Bar Association, 1906.
[2] Member Illinois State Board of Pardons.

The old law was as vicious a piece of legislation as was ever enacted. It was vicious because its enforcement gave the most gross inequality in sentences. It was vicious because it made criminals instead of reforming men. It was vicious because it gave the habitual criminal a short sentence, while the first offender most frequently received a long sentence. Let me call attention to a few facts which are within the knowledge and observation of every member of the bar who has been practicing for a half dozen years. Since the present constitution was adopted and the office of state's attorney for each county has succeeded to the former provision of a state's attorney for each circuit, about 25 per cent of the state's attorneys have been young men,— bright, smart, intelligent, but yet without having had much previous experience. The reason for this is found in the small compensation, the older and more able attorneys not caring for the office in view of the great amount of work for the income.

In many cases the young official found himself matched against the ablest member of the bar. When this occurred it was in nearly every case where the offender was a man with a criminal record. The result would often be that the state's attorney would be only too willing to accept a plea of guilty and have the man receive a sentence of one or two years. The very next case might be one where some fellow, filled with cheap whisky, had committed some minor felony; he was poor and had no money to employ a lawyer, and the court in nearly every instance appoints some young and inexperienced member of the bar. The prior conviction, the plea of guilty and the short sentence, had caused indignation in the community, and this feeling permeates the courtroom. The second man goes to trial; the state's attorney is equal if not superior, in point of ability and experience, to the attorney for the defense. The evidence is heard, the jury retires, not only to consider their verdict, but with a determination to see that "the majesty of the law is vindicated," and they bring in a verdict giving the poor fellow a ten years' sentence.

When these men came to compare notes, the first would let it be known that he had committed numerous crimes and had before served in prison. The second man had never before transgressed the law, and the law itself did not recognize his crime to be as great as that of the other, and yet he had received five times the punishment. He became embittered against the law. During his long nights in his lonely cell he again and again contrasted his lot with that of the other, and when he was released he went out determined to wreak vengeance against society for what he felt was his unjust if not inhuman punishment. He never permitted himself to go back to the circumstance of his conviction; he never reflected that the friends of the other man had come to his rescue and had secured for him the best legal talent, while the young man who had defended him was entirely without experience. He only knew and only thought of the small crime he had committed and his own

blameless past record, and its result of a long sentence as contrasted with the criminal career of the other one and his short sentence.

Another important factor always entered into the trial, if the state's attorney would not accept a plea of guilty, where the prominent criminal lawyer was employed. The attorney would never fail to have one or more friends on the jury, who would stand out for an acquittal or a short term, and a compromise verdict would result, and the compromise was always for a short sentence.

Let me illustrate another vicious feature of the old law. A number of years ago the farmers succeeded in having the law so amended that the minimum term for horse stealing was fixed at three years. In this county a man might steal the most disreputable old horse ever seen on the streets; he was indicted for horse stealing, and, if found guilty, would have to serve at least a three years' sentence. In one of the adjoining counties a man might steal the finest imported horse that ever left the shores of France; he could be indicted for larceny and receive a year's sentence.

The habitual-criminal act failed in very many instances to solve the problem for which it was enacted, while in many other cases it only worked as a means of oppression. A man might have served a number of terms in other states, or even in this state, and the state's attorney know nothing of it, and consequently no allegation could be made in the indictment. The strange and unexplained feature of the habitual-criminal act was that it applied only to burglary, grand larceny, horse stealing, robbery, forgery, and counterfeiting, leaving out the crimes of manslaughter, rape, and a number of other crimes which are as serious as those embraced in the act. If a man was sentenced from this county for any of the crimes embraced in the habitual-criminal act, and afterwards committed a like crime in the county, he could very easily be convicted as an habitual criminal; but if he had committed the first crime in some other county, the probability would be he would not be indicted under the habitual-criminal act; and if he had committed crimes and served terms in other states, he was quite certain not to be indicted under that act. When one man was indicted under the act and convicted, and another man, at the same term of court, who had served previous terms was not so indicted, you emphasized the inequality of sentences in a marked degree and turned the first man out of prison a confirmed criminal. I have said the habitual-criminal act was sometimes a cause of oppression. One of the strongest illustrations of the wrong which could be inflicted by the habitual-criminal act came under my notice in a case from St. Clair County. A young colored man who had just reached his majority was convicted of burglarizing a chicken house and taking therefrom a half dozen chickens. For this he received a year's sentence. He returned to his home at the expiration of his sentence, and for some six or seven years led an honest and upright life. One night he became hungry for chicken, and went out and again broke into a chicken house and stole three chickens. He was

indicted under the habitual-criminal act. The jury found him guilty, and there was no escape from the maximum sentence of twenty years. I admit this was a most unusual case. Perhaps the state's attorney would not have been blamed if he had nollied the habitual count in the indictment, but he felt it to be his duty to have it inserted. The trial judge, one of the most able and conscientious in the state, felt that the fault was not in the administration of the law in this particular case, but in the law itself. But there was no escape from this provision of the law; the indictment of the person as an habitual criminal, its proof and finding of guilty, and the maximum penalty had to follow.

I believe there is no one who will deny the proposition that the man who commits his second crime should be more severely punished than the one who commits his first, the crimes being practically the same. And neither, I believe, will any one deny that the man who commits his third crime should be punished more severely than the one who commits his second, the crimes being practically similar. If these results could have always been secured under the old law, or if they could have always been secured under the habitual-criminal act, then there could have been no complaint against the law; providing, of course, they could have been accompanied by something near an equality of sentences, not only from the same county, but from the various counties of the state.

Before drawing a contrast as to the results of the definite-sentence law and the parole law, let me state how the parole law is administered.

When a prisoner is sentenced under the parole law, it is the duty of the trial judge and state's attorney to attach to the mittimus an official statement of the facts and circumstances constituting the crime whereof the prisoner was convicted, together with all other information accessible to them in regard to the career of the prisoner prior to the time of the committal of the crime of which he was convicted, relative to the habits, associates, disposition, and reputation, and any other facts and circumstances which may tend to throw any light upon the question as to whether such prisoner is capable of again becoming a law-abiding citizen.

After the man has been in prison about five or six months he is furnished with a blank containing a number of interrogatories regarding his life for ten or fifteen years prior to his conviction. The object of these inquiries is to learn whether or not the man has been leading a criminal life; to learn if he has been a sober, industrious, and law-abiding citizen. The parole law being intended to aid men to reform if they so desire, as well as to carry out the other intentions of the penal statute, it is necessary to know the history of the man, — to learn what have been his habits of life, and from these conclude, as well as can be done, whether or not the reformatory feature of the law will find a response in his conduct while on parole. I am aware that here and there can be found those who hold to the idea that the prison officials can judge whether or not a man is reformed. Experience and observation tell me this doctrine is the

sheerest nonsense. The bank cashier is a model citizen; he is regular in his attendance at church; he gives liberally to charity; he visits the sick neighbor; he is the pattern of the esteemed citizen and the model husband and father. Then the community is shocked when it wakes up some morning and learns that he has run off with the bank's money and his neighbor's wife. The men working beside him for years never suspected he was a scoundrel and a thief; the community had learned to love and respect him. Then how absurd it is to take the ground that the prison guard, having control of fifty men, can say whether or not a man has reformed. It is the habitual criminal — the man who has been there before — who makes the model prisoner, but he is always on the lookout for a chance to escape. The time comes when the man must be trusted on the outside, and all the state can do is to lend its aid in again placing him on his feet, so he can, if he will, become an honored citizen. And this the old law never did. The state had exacted its pound of flesh and was content. If the trial judge and state's attorney say the man has always been a resident of the county from which he was sent, and that he has never before been convicted, the work of hunting up his record is simplified. If, however, he is a stranger in the county, then a most thorough investigation is made and correspondence is had with other prisons and with other officials. Of course the fact that punishment is inflicted not only as penalty for outraged law but also as a warning to those who might be guilty of similar crimes must never be lost sight of. And in deciding how long a person shall be retained in prison, the varied objects for which criminal laws are enacted must all be considered in their application to the individual.

If the prisoner makes good the time which the law allows him and has never before been in prison, he comes before the board at the expiration of eleven months for examination for parole. If he has served a previous term in prison, he is not brought before the board until he has served a two years' sentence; and if he has served two prior terms, then not until he has served a three years' sentence, and so on. The reason for this is that there could be no justification, except in some very exceptional cases, for the release of a man serving his second term at the end of eleven months. It might occur, of course, subsequent to his conviction, that some new evidence had developed in mitigation of his crime to establish his innocence; and if this should occur, then his case would be entitled to the very earliest consideration.

When a prisoner is brought before the board, he is permitted to give his own statements as to his crime, and is closely questioned as to his past life and all other matters which pertain to a careful investigation of the circumstances and surroundings; the statements of the trial judge and state's attorney, together with statements of those who have known him for years prior to his conviction, are all considered, and then either a parole is granted or the case is continued to a time when the man will be paroled.

In considering the question of the parole of a prisoner many perplexing questions present themselves. Three things stand out clearly as the object of the criminal law, — punishment, reformation, and warning to others. Some of the eminent penologists who have never been inside the walls of a prison hold that the object is reformation; others equally eminent, and with equal experience, hold that one of the other objects is the only one to accept as a guide.

In many cases there is no doubt that when the gate clicks behind the prisoner and he is marched to the Bertillon room to be photographed and measured, he has suffered much more punishment than another man would after he has spent ten years behind the bars.

I call to mind one case in point. A prominent young man was sent from one of the cities of the state for forgery. He was a member of two or three clubs, a patron of the theater, a hail fellow well met. He had a beer salary and a champagne appetite and associates. His bills had to be paid and he had to maintain his social position. To do so he resorted to forgery, and before he was convicted had committed the crime some forty or fifty times. At the end of eleven months, in accordance with the rules of the board he came before them for parole. There was no question as to his exemplary life up to a certain time; there was no question but he was receiving as good a salary as others who were performing similar service; there was no question as to the eminent respectability of his parents and relatives. He was making enough money to have paid all his legitimate expenses and placed a small amount in the savings bank at the end of each month, providing he had been content to not permit his outgo to greatly exceed his income. He would not do this, but betrayed the trust reposed in him, and for months carried on a most ingenious system of forgery. So far as punishment is concerned, the probabilities are that when the convict barber began to shorten the hair of the man, he had received as great a measure as would be many years to others. But if he had been released then, what of the example to others holding similar positions of trust? What protection would be afforded the business men of the state who are compelled to intrust their interests almost entirely to employees? And what would be the effect upon the more than a thousand men in the prison who knew that he came there dressed in the height of fashion and had on the outside prominent clubmen, and, through their appeals, many prominent officials and citizens asking for his parole? This is one case where the deterrent effect of the prison servitude must very largely enter into the consideration of the length of time the man must serve behind the prison bars. And yet, as the prisoner marches along between men whom he would not have permitted to black his boots, as he looks out upon his lengthening days of imprisonment, there is the danger of making him a criminal for life if he is confined too long. Gradually his friends will weary of work for his release, gradually he will be forgotten, gradually his former social position

becomes nothing but a memory, and when he is released he cannot well fit into his new surroundings, and he may seek a life of crime because he is disgraced anyway. There are many people who honestly believe that social position, political influence, and money control the courts and all the avenues of justice, and this belief must always be considered in the administration of the criminal law.

The law must not be administered according to the political ethics of a party caucus, but there should ever be present the desire and disposition to act so as not to bring into contempt or ridicule the administration of the penal statutes. The leader of the mob pleads, in extenuation of his crime, the lax enforcement of the law, and while, in almost every case, he is a composite of the liar, the thug, and the scoundrel, yet he can always find plenty who will join him in his denunciation of the courts. It is therefore better always to take into consideration the public welfare rather than adopt the motto ascribed to Vanderbilt.

When the board has made an order for the parole of a prisoner, the matter of his employment is left to the warden of the prison in which he is confined. The law provides that before he shall be released on parole, employment shall be secured for him during the period of his parole. After being released on parole, all that is necessary for the prisoner to do is to obey the law, abstain from visiting saloons or using intoxicating liquors, and keep away from evil associates and practices. Under the law the prisoner must serve at least six months on parole, but the board has the power to extend the period.

The contention is frequently made that the jury, which hears the testimony, sees the witnesses, and has the defendant before them, is better able to judge how long a man should be retained in prison than is some board which comes along eleven months afterwards and does not have the witnesses before them. If one jury could try all the cases in the state so that they could then equalize sentences, there might be some force in this contention. But those who take this view forget a few important things which deserve consideration. About 75 per cent of the prisoners are nonresidents of the county from which they are sent. There is no way for the sheriff, the police, or the state's attorney to hunt up their record. Neither the sheriff nor any other officer of the county is furnished with money to even send to the various cities photographs of prisoners. In only three or four counties outside of Cook is the Bertillon system in operation. In our own county, if a man is arrested whom the officers think may be a man with a record, if they undertake to hunt up his record, they must do so at their own expense and take the chances at being reimbursed. In the city of Chicago there is the most complete Bertillon system in the country, and it is under the control of the most able superintendent in the United States. And yet we frequently find among Cook County prisoners men of whom he has no record, but who have served one or more terms in prison; but they have served in states where

there is no system of identification, because there are states where they do not even take the photograph of a prisoner.

Let me sight a few of many instances which show the benefit of requiring men to disclose their past record. There are confined in one of our prisons two of the most noted forgers in this country or Canada, in the latter each having served two terms, and they are now wanted in several states. They went to one of the smaller cities of the state, and, having operated in many of the larger eastern cities, had no doubt of their success in what was little more than a country town. Fortunately they were arrested. There was no doubt of their guilt, and as no opportunity presented itself for them to break jail, they pleaded guilty, but not until the state's attorney had told them he would recommend their release at the end of one year. When they reached the prison the sheriff brought with him a strong letter from the trial judge and state's attorney to the effect that the men had never before committed crime, and they should be released at the end of one year's sentence. Neither the judge nor the state's attorney knew anything of the past history of the men only as they had learned it from them. But when the board was through with its investigation, the men admitted their criminal career.

Another man came to the prison backed not only by a strong indorsement from the trial judge and state's attorney, but also from the attorney of the railroad whose goods were stolen, each insisting the man had never before committed crime and should be released at the end of one year's sentence. The man had not been out of Washington state prison, where he had served a seven years' sentence, sixty days before his arrest for the crime of which he was convicted. He had also served a five years' sentence in California, had broken jail four times, and admitted some fifteen burglaries.

Another state's attorney recommended the parole of a prisoner at the end of one year, but when the board had investigated the case and wrote the state's attorney the man had served three terms in Nebraska, two in Kansas, one in Missouri, one in Chester, and was then serving his second term in Joliet, his enthusiasm for the man's early parole waned very considerably. I might remark in passing that this prisoner has no respect for the parole law since he learned the board had decided to hold him until the expiration of his maximum term, whereas he has never had more than a two years' sentence at any of the prior convictions.

All laws should be judged by their results. It cannot be positively said that any criminal law reforms any great number of men, because we know positively a man, once in prison (as well as many who should be there), is reformed only when he is dead and buried. Under the old law the man served his sentence, left the prison, and that might be the last ever heard of him. It was the business of no one to keep track of him and see that he was employed. The world had moved on while he stood still. He returned to his old home. The streets, when he knew them,

were veritable mudholes half the year and crowded with weeds the remainder of the year. He returned to find the streets paved, the log huts given way to neat frame and brick cottages; there were electric lights and free mail delivery. It was all new to him; he had read of it, but had failed to realize its full significance. It was then he needed a helping hand; it was then he needed some one to aid him. In those new surroundings he was often overcome by despondency and soon found his way to the haunts of vice, and erelong was again marching with the lockstep of the convict.

Under the parole law the reverse obtains. The man has a home to go to when he leaves prison, — he has employment, — there is some one to help him. The conditions of the man released on parole are entirely different from those of the man released under the old law. The best evidence of the reformative feature of the parole law is found in the fact that not fifty persons who have been paroled in Illinois have been afterwards sent to prison again for crimes committed after having served their parole. Comparing the few men who have been returned to prison after having served their parole with the number of those who have served previous terms in states not having a parole law, I have no hesitancy in pronouncing the parole a great success as a purely reformative measure.

Is the parole law a success in meting out punishment to offenders, and does it carry out the theory I have claimed for it in this regard?

During the last year the definite-sentence law was in force about 40 per cent of the prisoners were released by virtue of the expiration of their sentence. During the year 1903 less than 30 per cent were released on parole.

Those released during the last year the definite-sentence law was in force served inside the prison walls an average of one year, seven months, and eleven days.

Those who were paroled last year served inside the prison walls an average of two years, four months, and sixteen days, and one year on parole.

Thus it will be seen that the men serving under the parole law served nine months longer, on an average, inside the prison walls, than was served by those sent under the definite-sentence law. While this is true, a greater per cent of men serving their first term were released under the parole law last year than in any preceding year. The increased average time served by those sentenced under the parole law arises from the increased length of time the habitual criminals are kept in prison. There has never been a time in the history of the prisons of this state when there was such a great per cent of prisoners serving the maximum term provided by law for their crimes, as now. The law is administered to help the unfortunate man who commits his first crime, and it is administered to protect society from those who live by crime. Instead of the

man who commits his first crime being punished longer than the habitual criminal, the rule is reversed.

During the last year the definite-sentence law was in force there were received at the Joliet prison 113 second termers, 36 third termers, 13 fourth termers, 5 fifth termers, and 2 sixth termers.

During the year 1903 there were received at the Joliet prison 51 second termers, 5 third termers, 4 fourth termers, and 1 fifth termer. The great majority of these, having served in other states, knew nothing of the operation of the parole law.

Notwithstanding what I have said, most of you have doubtless read in some of the Chicago papers some very severe criticisms upon the action of the Board of Pardons, to the effect that habitual criminals were being released, while those who had no political pull were being retained behind the prison walls. As the records of the board are public, the board has not thought it necessary to rush into print on these questions. It might not, however, be out of place to call attention to one case which is a fair illustration of the situation. One Chicago judge gave out a most bitter and vindictive interview in regard to the board, charging that habitual criminals were released at the end of eleven months, while poor fellows who had no political influence were retained in the prison the maximum term. An investigation showed some rather startling facts as to the history of that judge. For the last five years the definite-sentence law was in force he had sentenced, either on the verdict of the jury or a plea of guilty, 73 persons to the Joliet penitentiary. These persons served, inside the prison walls, an average of one year, nine months, and thirteen days. Among the number were four men who had served one prior term each, but only served eleven months under the definite sentence; while one other had served two prior terms, but only served eleven months under the definite sentence. This same judge had sentenced 47 men to the penitentiary since the parole law has been in force; a number of these latter have had their cases continued to the maximum term, and when they have all been liberated they will have served on an average, inside the prison walls, two years and six months, or nine months longer than under the old law, and not one of them who had served a previous term was released at the expiration of eleven months. Those whose cases were not continued to the maximum will be required to serve twelve months on parole.

Where the crime is not of the greatest magnitude and the prisoner has previously borne a good character, the reformatory intent of the law should be applied, and in nearly every case is applied, at the end of the first year. There are, of course, exceptions to the rule, but the rule is proven by the exceptions. Where a man has persisted in committing crime — where continued punishment has not reformed him and he has paid no heed to continued imprisonment — the one thing to be considered is, how long shall society be protected. The law, in such cases,

has fixed the limit, and in a great majority of instances there is little justification for reducing that limit.

The number of habitual criminals is being reduced because that class is learning that a conviction in this state means a long term in the penitentiary.

No law will stop crime. A wise and humane law will hold out to the one who commits his first crime the lamp of hope all trimmed and brightly burning. A just law will protect society and the individual from those who prefer to lead the life of a criminal. The old law was too often neither humane nor just. By the partial and unequal manner in which it necessarily had to be administered it made criminals of many and reformed few. Neither courts nor juries should be blamed for the manner in which it was administered, because the objections which I have urged against it were beyond their control. Under the parole law the first offender is given ample aid and encouragement if he is desirous of reforming, while the habitual criminal is learning that if he desires light punishment he must confine his crimes to some other state than Illinois.

THE PENNSYLVANIA CONSTABULARY[1]

Dispatches from the coal fields these days tell a stereotyped story limited to a few hundred words. They usually begin "a riot broke out here," and end "quiet was restored when the constabulary arrived." In New York the word "constable" calls to mind a rural person with a thin beard, a wide-brimmed straw hat, a linen duster, and a nickel shield pinned on his chest. The Pennsylvania constable is different. He is something brand new for the states in the police line, and was created to take the place of the militia in handling strikes.

The Pennsylvania constabulary is a permanent force of mounted men, — four troops of two officers, five sergeants, and one hundred and fifty men each, — every man of them chosen for his physical build, discretion, fearlessness, and ability to tame men. Eight out of ten of them have seen military service in four lands, and most of them were noncommissioned officers before they left the army. They resemble the Canadian mounted police and the Texas Rangers more than anything else, although the organization itself was built largely on the lines of the Irish constabulary.

Every trooper can ride and shoot and give a good account of himself in a rough-and-tumble fight besides. But these talents, while they count in a pinch, do not establish a morale in the force. The secret of that is the realization of one-man strength, the power of quiet confidence, and a belief in the effect of the uniform. Captain John C. Groome, state superintendent, who recruited, organized, and equipped the constabulary, has taken as his standard for measuring the strength of a mob: "Each mounted trooper is good for a hundred men."

[1] New York *Evening Post*, 1906. Reproduced by permission.

The four troops are distributed over the state so as to cover as best they can the one hundred-odd coal and iron mines. The Reading troop is ready to answer day alarms from this vicinity, the Wilkes-Barre troop guards the country farther north, and the Greensburg and Punxsutawney troops are watching the central and western fields, — fifty men for each scene of trouble, covering a radius of thirty miles! Even a more solitary patrol than our own mounted police have in the outlying districts of Richmond and Queens. When the coal-strike difficulties are settled, the constabulary will patrol this country in pairs. The stations may then be increased to eight, each occupied by one section of a troop, and each section divided into three reliefs of six hours apiece. Each beat will then be about sixteen miles long, and when the constabulary are on duty they will, in addition to the duties of a policeman, have to act as fish, game, and fire wardens.

Eleven to do the Work of Two Thousand

Heretofore Pennsylvania has relied largely upon its National Guard to awe the turbulent factions that gather around the coal mines in time of strike. Two thousand armed men to one troublesome town was the militia's ratio for pacification. By the ethics of the constabulary a sergeant and ten men are expected to handle such a district. The mounted constable enforces the law very much as did the sheriffs in those strenuous years when the West was young. He must be absolutely fearless. If he shows the white feather once, his usefulness is done for and the force has no place for him.

"My instructions to each trooper," said Captain Groome recently, "leave a lot to his discretion. If he starts out to get his man, he must get him, if he has to butt into the middle of a mob to find him. The troopers are counseled not to use their guns unless they have to."

At the Cornwall ore banks early in March five hundred foreigners became angry because they could not persuade the men keeping the fires to quit work. They assaulted several inoffensive workmen and chased the sheriff's deputies. The sheriff telephoned for aid. "Send your whole force of constabulary," he urged. "These rioters are desperate!"

A sergeant and ten men were dispatched on the run. There was no time to get the horses entrained, and the detail went whirling to the scene of trouble in a caboose and engine. No sooner had they arrived than the smallest man in the bunch forced his way bodily into a crowd of angry aliens and grabbed a big foreigner who had "pulled a gun." The prisoner showed fight and his friends offered to help him. The trooper swung his stick just once, the big fellow dropped, and the crowd ran like sheep.

At Yatesville twelve troopers dispersed a mob of seven hundred, and went through a tough settlement on a hunt for firearms, bringing out a small-sized arsenal after the inhabitants had pleaded they were "good

citizens" and had no guns. The houses raided had sheltered "pot shooters" who, for several nights, had kept up a desultory fire on the windows and doors of the colliery a few hundred yards away at the foot of the hill.

At the Franklin colliery, also near Wilkes-Barre, strikers dispersed a guard of deputy sheriffs and clubbed and knifed a few workmen who had been taking coal from a culm bank to keep up steam for the engines that pumped water from the mines. This was as per agreement between operators and miners. The mob, however, beat these employees severely and started out to wreck the colliery, when a small detail of mounted constabulary arrived. It was just about dusk. The sergeant asked the men to disperse and they refused. He told them they would get hurt if they did n't, and they jeered at him. The sheriff pointed out two ringleaders and the sergeant asked them to step out and give themselves up. This request was also refused.

" Tell them I 'm going to take them," said the sergeant to the interpreter; " and all those who want to have their heads crushed will please stay right where they are ! "

Then the mounted men rode into the brown and the long locust sticks were laid right and left. The mob tried to run, but it could not get away from the horses. Franklin Colliery will not forget that sight for many a day. When the troopers rode back to their barracks they had two badly damaged prisoners handcuffed and walking between them. Several more were taken the next day.

At Windber, down in the southwestern part of the state, ugly feeling between the miners and the deputy sheriffs culminated in a shooting in which three miners were killed outright and a ten-year-old boy was fatally wounded as he was looking on. The shooting occurred at the jail in an attempt to rescue several men who had been arrested. The sheriff lost no time in telegraphing for the constabulary. Greensburg barracks were nearest to the scene of trouble, and two sergeants and twenty men with horses were loaded aboard a special and started for Windber about ten o'clock at night.

Ordinarily it is a run of four hours, but a wreck on the line held the constabulary until daybreak, and it was not until seven o'clock that they detrained. Without breakfast the troopers went right at work, serving the sheriff's warrants, making arrests, and searching for concealed rifles, shotguns, and stilettos. To do this they were compelled to enter strange houses, grope in the dark, and run the risk of a knife thrust when and where they least expected it.

Through their interpreter the sullen foreigners were told that the state insisted upon law and order, and that the mounted troopers would see that law and order was maintained. The detail then divided into pairs and started to patrol the town. These men had two days and two nights of continuous duty before they could get any rest.

The constabulary is uniformed in dark gray whipcord, with black putties, and dark gray helmets. The blouse is very much like the blouse of the field-service uniform of the regular army, and for fatigue duty the troopers wear a dark gray cap, also shaped like those of the army. The combination has a neat soldierly effect and is not without its dignity. For winter there is a roomy greatcoat of the same color that will cover both the wearer's legs as well as the pommel and cantel of his saddle. For storms in summer the rubber cavalry cape is provided. The horses are supplied by the state, as well as the uniforms. Most of the mounts come from the West. If they are not as trim and sleek as those of our mounted police, they probably are of greater endurance. The country which they have to travel is stiffer, and rocks and thorns more common than shade trees and macadam roads.

It is not to be wondered that this duty is attracting the best noncommissioned officers from the regular army. The work is more exciting, the men have a chance for more initiative, and are paid quite handsomely. A private of constabulary receives $720 a year, his horse, uniform, and a house to live in. The regular gets less than $170 a year and his food, clothes, and care. But the mess account at a constabulary barracks is not usually an extravagance. It runs about $10 a month per man, and as he advances in promotion his pay increases accordingly. A sergeant receives $1000 a year, a lieutenant $1200, and captains $1500. No married men are accepted. Terms of enlistment are for two years unless sooner discharged for cause, and with the long waiting list at headquarters, the troopers have to lead rather exemplary lives to hold their positions. When Captain Groome began the examinations of men, to enlist a force of two hundred and thirty-two, he had over one thousand applications.

The country which the constabulary patrols is not as wild as Texas or the Northwest territory, but there are parts of Pennsylvania which, to say the least, are obscure. The constabulary to some extent will supersede the Coal and Iron Police, now paid and directed by private corporations. Experience has taught Pennsylvania that the alien element needs something more formidable than either sheriff or militia to impress mischief-makers with the authority of the law. Therefore, upon the combination of policeman's club and helmet, soldier's uniform and gun, with a real fighting man inside, who can at times use discretion, Pennsylvania relies to solve a vexatious problem.

Texas, when it first put the famous Texas Rangers in the field, was confronted with a similar situation. These riders owned their own mounts and received $40 a month, with arms and ammunition, from the state. It was the life, not the pay, that attracted men to this force. Like the mounted police of Canada, they chased outlaws, road agents, Indians, and cattle thieves, settled land disputes, made Texas orderly, and gained the respect of every class of the lawless and criminal. They stayed in

the saddle for hours at a stretch, rode miles upon miles of dreary wastes, but never failed to get what they started for, and accomplished their purpose without noise or bluster.

In place of hot sun and freezing blizzards which the Rangers and Canada's Mounted Police have to face, Pennsylvania's constabulary must ride dangerous hill and mountain roads in fogs and darkness, bitter cold winter weather, and deep snow. There probably is n't a more treacherous country east of the Mississippi than these same mountain districts of Pennsylvania.

In some manner the impression has gone out that the constabulary is a creation of the state for the sole protection of the property of the big coal operators. Nothing could be farther from the truth. The constabulary is a venture in economy, but labor trouble was only one of the causes that brought about its organization. The Pennsylvania legislature, it is true, became tired of providing for the payment of its National Guard when on strike duty. It costs a pile of money to keep even one regiment in the field for a single week. Several regiments have been necessary every time Pennsylvania has resorted to martial law, and the bills that resulted seemed a wicked extravagance to Pennsylvania Dutch economy.

Governor Pennypacker was largely responsible for the bill which created the constabulary, but the measure was popular enough with the members to go through without any question, and they appropriated over $400,000 on the spot, to be used at the discretion of the superintendent in raising the new force. In fact, so willing were they to let the governor lift the troublesome state-police business off their hands that they took very little pains with the bill itself, and consequently the law as entered on the statute book is not the strongest one in the world. It has sufficient weak spots to tempt the United Mine Workers of America to test its provisions in the courts. Resolutions have also been passed by this body calling upon members to urge the repeal of the law by the next legislature.

Apparently the trouble-makers in the mining districts see in this mounted force a new and important factor in the outcome of future labor movements. Therefore they do not wish it to interfere whenever they start a demonstration. But besides troublesome people in the coal fields, Pennsylvania has other bad men abroad, and these have a faculty of operating through the country districts out of range of the city police. Yeggmen, horse thieves, game poachers, and highwaymen, — all ply their trade in this state. The constabulary is to pursue these fellows just as hard as the rioters among the coal and ore regions.

V

THE STATE ADMINISTRATION

THE GROWTH AND FUTURE OF STATE BOARDS AND COMMISSIONS[1]

By F. H. White

[Among the most striking developments of the last decade or two is the growth of expert commissions and boards in the state governments. In many commonwealths these organs of the administration are the direct descendants of legislative committees.]

In America, for a hundred years before the Civil War, the governmental questions uppermost in men's minds were chiefly, though not exclusively, constitutional; since the war they have been mainly administrative.[2] That is to say, prior to the Civil War questions of independence, of the interrelationship of governmental departments, of state rights, of suffrage, occupied most attention; while, since the reconstruction period, interest has been centered on the relations of the state to great corporations, on capital and labor in their industrial struggles, on state aid in the development of the country's resources, on the methods and measure of taxation, on the protection of the health and morals of the people, and on the furthering of educational, industrial, and philanthropic enterprises. The problems here have been largely those of administration, — of efficient exercise of power by governmental agencies.

This increased administrative activity has sometimes found expression in laws general in character and requiring no special machinery for their execution; but more frequently a special need — industrial, scientific, educational, philanthropic — has called into existence a special organ of government to supervise, aid, or manage the affair. This is the source of those boards and commissions which have in late years become prominent in all the states, but more particularly in those having the most complex and highly developed industrial organization. These bodies are the latest product of governmental evolution. They have developed since the Civil War, many of them during the last two decades; and a study of their form and action will reveal the tendencies of governmental progress and the advance already made in certain directions toward paternalism and state socialism.

[1] From the *Political Science Quarterly*, 1903

[2] Goodnow, Comparative Administrative Law, Vol. I, p. 4.

I. Origin and Distribution of the Boards and Commissions

Several causes have contributed to the establishment of these bodies. One undoubtedly is the growing consciousness of the legislator that he must have more light before filling the statute books with laws. Especially does he feel this when dealing with the great and complicated interests that have arisen from the expansion of our social and economic life. A number of the commissions may be said to have had their origin and prototype in standing committees of the legislature. Of course it has long been the custom of legislative bodies to refer matters requiring investigation to special committees, composed of their own members, in order that data may be collected, evidence heard, and recommendations proposed. But the shortness of legislative sessions in most of the states, and the lack of expert knowledge and of necessary leisure on the part of the legislators themselves, have sometimes led them to establish a committee or commission composed of outsiders possessing special knowledge of the subject, and able to give their whole attention to the matter in hand.

This explanation of their origin would hardly hold good for many of the boards and commissions; for example, those designated "executive." In this class the original purpose was not so much to collect information as to get something done; and the same is true of "supervisory" and "examining" commissions. The impulse to the formation of such commissions has frequently come from outside the legislature, and the whole plan and organization have been suggested independently of that body. Public opinion has first been aroused by earnest advocates of the proposed extension of governmental functions, and this has finally had its influence upon those in authority. A bill has been introduced and forced through, and the establishment of the commission has followed. The Massachusetts Board of Health, and later the Highway Commission, are cases in point, and good examples of the deliberate manufacture of public sentiment.

Another cause of the establishment of boards and commissions is found in the growing strength and solidarity of professional and industrial organizations. Realizing that the good name of their profession was suffering, and the practice of their members at the same time diminished, by the quackery or unskilled work of persons pretending to have the necessary qualifications, medical, dental, pharmaceutical, and other associations have used their not inconsiderable influence to secure boards of registration and to obtain laws forbidding practice by unregistered persons. In the same way industrial organizations are realizing more and more what a useful ally the government can be in limiting numbers in each line of work, and a movement to invoke this alliance is growing in strength. The Pennsylvania law requiring miners to obtain certificates in order to work in the coal mines of that state is a case in point.

As to the distribution of the commission system through the Union, Massachusetts, the pioneer in adopting the system, distances all the other states in the number of such bodies and in the variety of interests placed under their care. This development, however, has not continued without protest. Illinois stands next. In general, it may be said that the states having highly developed manufacturing and commercial interests lead in the number of such bodies. The exceptions are Kansas and Colorado, which possess a surprising number for states having agriculture or mining as their leading industry. The New England states, with the exception of Maine and Vermont, have a pretty full development of the system, attributable to the influence of Massachusetts and the general similarity of economic and social conditions. The southern states, as a rule, have but few commissions.

II. Duties of the Boards and Commissions

So various are the duties assigned to these bodies that their classification is made very difficult. A careful examination, however, reveals that they may be grouped under the following heads: Industrial, Scientific, Supervisory, Examining, Educational, Executive, Corrective, and Philanthropic.

1. *Industrial.* Examples of such bodies are to be found in boards of agriculture, dairy and food, horticulture, and inspectors of mines, oil, fish, live stock, grain, steam boilers, steamboats, workshops, and factories.

A majority of the states have boards of agriculture; the first three boards and inspectors of mines and oil mentioned above are represented in perhaps one fourth of the states; each of the remaining boards and inspectors in about one tenth of the states. There are a number of other boards that are represented in only one or two states; for example, terrapin inspectors (South Carolina), beef and scythe stones (Rhode Island), silk commission (Kansas), tobacco inspectors (Maryland), bakery inspectors (Ohio).

In boards of this kind we see an effort of the states to further special industries, because of their present or prospective importance. That so large a number have established boards of agriculture and kindred bodies (horticulture, cattle, etc.) reveals the immense importance of the industry, and perhaps, incidentally, of the farmers' vote; for it must be admitted that commissions are sometimes formed to indicate an interest in a particular class rather than to meet a real need or demand of the industry thus favored.

These boards of agriculture have endeavored to advance the industry by spreading information concerning the best methods of soil cultivation and of stamping out diseases prevalent among the domestic animals, by making known the advantages their respective states possess for agricultural pursuits, by organizing and conducting farmers' institutes to discuss

matters of interest and exchange experience. These and other duties have, on the whole, been fairly well executed. On the other hand, the boards of agriculture have not been without faults. A tendency to move only over the surface of the questions presented for discussion, to be popular at the expense of a more thorough and adequate treatment of the problem discussed; a willingness to boom some new or promising field of agricultural work without due consideration of anything but immediate consequences and surface conditions; and a too ready yielding to the temptation to give advice as to the best methods, etc., when no really scientific investigations have preceded, — these are the chief, though perhaps not the only, faults of these bodies.

Of a somewhat different character from the boards of agriculture are the commissions charged with the duty of looking after the quality of the staple articles of their respective states, and of seeing that various means of manufacture, of power, of transportation, etc., are in proper condition. The purpose here is to protect the health of the consumer, the good name of the states' products, and also, in some cases, the safety of the employees. The inspection of mines and manufactures, however, has not yet proceeded very far, but may be found in a few of the states.

The experiment of Ohio in providing a free employment bureau, a state labor exchange, has been followed only in New York.

2. *Scientific.* Boards of health are found in most of the states; bureaus of labor statistics have been established in about one half; boards of topographical or geological survey in about one fourth of the states. Other boards and commissions of this general character (public records, forestry, weather service, drainage), and such public officers as vaccine agent and state chemist, are found in but few states.

The desire for exact information, for the highest expert knowledge, grows apace, and has found expression in the creation of these bodies, charged primarily with the collection of scientific data; though some, like the boards of health, have executive duties to perform. It is a promising sign of the times that the number of such commissions is increasing. The great multiplication of boards of health also indicates a determination to use the approved results of scientific investigation in the most effective way for the prevention of epidemics and the general preservation of the health of the people. Of course this is a species of paternalism, though surely of a very justifiable kind. The almost absolute power of these boards in condemning property, isolating individuals, and establishing quarantines is worthy of more attention from students of government.

The large number of states that have established bureaus of labor statistics since Massachusetts set the example in 1869 indicates the need felt of securing adequate data before attempting to cure social ills. No doubt much that has been secured by these bureaus is almost useless, owing to the failure to observe the strict requirements of scientific investigation. Politicians, unfortunately, have frequently secured appointments

at the head or on the staff of the bureaus as rewards for political services; or, in order to secure the favor of labor organizations, untrained men have been put in such places, with the result that their work is discredited, and fails to inspire confidence in its accuracy or scope. Being ill trained or untrained in the difficult work of collecting, classifying, and generalizing the necessary information, the results prove inadequate, inaccurate, and misleading.

Still, much use has already been made by statesmen, students, and writers, of the matter presented in the reports, not only in this country but elsewhere. The example of the United States in collecting and publishing industrial information in a systematic fashion has been followed quite largely in other countries.

3. *Supervisory.* The most conspicuous examples are boards of arbitration, railroad commissions, and commissioners of insurance, inland fisheries, and game. The last three are found in a large number of states, the first in at least eight. Several states are experimenting with boards of inspectors whose duties are to supervise corporations (Massachusetts), gas and gas meters, building and loan companies.

The commissioners grouped under this head are probably better known than any others. The railroad and insurance commissions have been the most prominent. The railroad commissions are of two varieties: one, of which Massachusetts furnishes the type, has power to direct attention to cases of neglect, ill treatment, overcharges, etc., by the railroads, but no power to compel obedience; the other variety, represented by most western commissions, possesses power to compel railroads to obey its orders, subject, of course, to the courts.

There is a difference of opinion as to the relative merits of the two kinds, though the tendency seems to be toward the latter. The commission that has no direct power of compulsion is expected to act on the roads through public opinion, and, ultimately, through the legislature, should the roads prove obstinate. The commissions possessing direct power have found themselves much circumscribed by the federal courts, that insist on the right to review their decisions and reverse them when they appear to be cutting so deeply into the revenue of the roads as to make it impossible to pay fixed charges and some profits, or when the procedure of the commission seems inconsistent with due process of law. Kansas has recently attempted to get around both of these points by establishing a special "court of visitation," founded for the purpose of controlling rates. It seems unlikely that this new organization can stand the tests of the federal courts.

Insurance commissioners are endowed with great power in some states. For example, in Kansas, the insurance commissioner may absolutely exclude the most powerful companies from writing policies within the state. Such dictatorial power is certainly liable to abuse, and examples are not wanting of actions by a former insurance commissioner of Kansas that

have the appearance of a "holding up" of the companies, — of compelling them to pay for the privilege of operating in the state. It was commonly reported during his administration that emissaries from the commissioner tried to extort what amounted to blackmail from a number of the largest companies.

The movement to arbitrate labor disputes between employer and employees has crystallized in eight permanent commissions in as many states. In a number of other states the law provides a method of creating temporary commissions for the settlement of labor disputes when the occasions arise. They have had a moderate amount of success, but do not seem to have met the expectation even of their originators. In a recent case in Massachusetts the striking laborers and the employers agreed to submit the matter in dispute to the state board of arbitration and conciliation, but on the award being made in favor of the employers, the laborers refused to accept it. Such failures to abide by the decision of the arbitrators strikes a deathblow at the whole system.

4. *Examining.* Boards of registration in dentistry, medicine, and pharmacy are found in many of the states. In at least four there is a civil-service board, while several have boards or commissions whose duties are to examine pilots, veterinarians, undertakers, architects (Illinois), horseshoers (Illinois, Minnesota), barbers (Minnesota), and plumbers (Minnesota).

A very interesting development is presented under this head. The movement is spreading rapidly to provide boards for the examination of certain important skilled professional men and artisans. Dentistry, medicine, and pharmacy commissions are required by law to examine and register those persons who are to be permitted to practice their respective professions in the various states. Such a board is controlled by the profession concerned, and is moved, therefore, by a real desire to exclude unworthy members from the profession, and to preserve, so far as possible, its fair fame. The exclusions are made on the ground of unfitness alone, so that any attempt to limit the number practicing in the state can only be carried out by excluding the unworthy, and thus the standard will be raised. In all these professions it is not a greater number of practitioners that the public interests demand, but higher skill; hence such a system of registration may be expected to result in more rigid requirements.

Unfortunately the states have not yet generally provided an examining board for their own employees. The desire for civil-service reform has been gaining ground quite rapidly, however, and it is probable that the near future will see civil-service commissions established in other states than the few that now possess them. Still, there is hardly a session of the legislature in any of the states where the commissions exist that does not witness efforts made to destroy the law.

Minnesota has gone surprisingly far in providing examining boards for occupations other than the professions: bakers, plumbers, and horseshoers are registered in that state. In the New York legislature of 1900

an effort was made to establish a state board of examiners for the sanitary inspection of barber shops. The Brennan bill that provided this board was killed after some debate by a vote of 72 to 42.

That this movement is one of great significance, and that it may, if carried so far as to interfere materially with the free choice of occupation, produce important economic results, will be apparent to any one on reflection.

5. *Educational.* Boards of control of educational institutions and state boards of education are found in nearly all the states. Connecticut made a unique advance by establishing a board of sculpture, and Massachusetts has set an excellent example by providing for a public-library commission.

Notwithstanding vigorous efforts to divorce politics from the educational and philanthropic activities of the states, the temptation to use the positions in the different institutions and boards as "spoils of office" has usually been too great for governors to resist, and the results have frequently been deplorable. The recent experience of the Illinois State Board of Charities may be cited as a case in point. Public opinion, however, is becoming more and more educated on this matter, and we may confidently look forward to a time in the near future when in most of the states politics will play no part in the administration of the state educational and charitable institutions.

6. *Executive.* The desire on the part of many states to get something done to carry through some great enterprise, even though at times it involved the entry of the state on ground supposed to be the exclusive domain of individual enterprise and initiative, has led to the formation of boards and commissions charged with such duties as the following: construction of highways, control of the public printing, selling of liquor (South Carolina), managing great sewerage and water systems, laying out extensive parks, constructing and repairing levees (Louisiana and Mississippi).

Massachusetts has led the way in this class of commissions. Her highway, subway, park, water, and sewerage commissions are all excellent examples of what the state may do under certain conditions. Municipalities, of course, have long been engaged in the construction of waterworks, sewerage systems, and parks, but there have been comparatively few examples of a state's undertaking such enterprises as these; hence the special interest that attaches to their success or failure. The occasion for a number of these commissions in Massachusetts is peculiar to the conditions prevailing around Boston. A number of thriving and well-to-do communities have grown up within a small radius of Boston, but their governments are entirely independent, though they stand in very close commercial and physical relation to the mother city. It became obvious that it would be to the advantage of all concerned that a general system of parks, water, sewerage, and transportation be devised; but as the towns were by no means ready to sink their

individual existence in a Greater Boston, it seemed best to have the state come in and provide a commission that would unify action and yet save the rights of each.

The commissions have thus far been remarkably successful in what they have undertaken. The Highway Commission has had an especially satisfactory career, and though it has spent a large sum, not a word of complaint as to misappropriation of funds has been heard, and no serious criticisms made on the work performed except as to general policy. It was urged by many that continuous good roads should be built instead of the detached sections planned by the commission. So strong was the demand for a different policy that a change was made a few years ago in the personnel of the commission. The character of the commission has been uniformly high. Most of its members have been experts of great reputation, and their general standing has been such as to command the highest respect.

Up to the present time the work undertaken by the states through their executive boards has consisted chiefly of great engineering enterprises. The important exceptions are the conduct of a public printing establishment, the purchase of schoolbooks, and the sale of liquors. It must be said that the conduct of all these enterprises by the state has been fairly satisfactory. That there has been any striking advantage to the public may well be doubted. Probably the activity of the states has hardly gone far enough in extent or time to warrant any sweeping judgment. That it has attempted these lines of work at all is a matter of deep interest, and may well cause us to ask in expectancy, What next?

7. *Corrective and Philanthropic.* Under this caption may be grouped such bodies and officers as boards of police and of charity and correction, general superintendent of prisons (Massachusetts), state agent to prevent cruelty to animals (North Dakota). Nearly one half of the states have state boards of charities. In all the states having institutions for the defective, dependent, and delinquent classes there are boards of control. Leaving these out of account, the various bodies or officers under this head, with one exception (Massachusetts, — State Aid), are the result of attempts to centralize administration in the state government, — to supervise and control local authorities. To a certain extent, therefore, they are in opposition to the policy of home rule.

Such work, however, was undertaken reluctantly by the state governments, and only when the abuses under the local governments were too great to be borne. The administration of public charitable institutions, like the almshouses and hospitals for the insane, or corrective institutions, like the jails and prisons, was admittedly bad almost everywhere. This was due sometimes to the poverty of the local communities, but usually to ignorance of actual conditions and to lack of acquaintance with better methods, or to the shortsighted penuriousness of the people of the community.

The state boards of charities in Indiana, Ohio, and New York are doing an incalculable amount of good by inspection and the requirement of reports. We should be better pleased, no doubt, if each community needed no inspection and required no oversight, — if the impulse to better things came from within rather than from without. It has been found in England, however, after long centuries of trial, and in this country after a considerable period of experience, that the local authorities cannot be relied upon to reform their methods of poor relief, or to stay reformed, if by chance they have a spasm of virtue and improve matters for a while.

Perhaps the explanation of the steady improvement under the state-board system may be found partly in the fact that the whole of the state seldom degenerates at the same time; that if one part deteriorates, the other portions, acting through the central body, — the state board, — apply the spur or the whip. In part, the explanation may be that the publicity which the state board can give to the failures of the local authorities keeps the latter ever on the anxious seat.

The control of the local police by the state is an experiment which has been thoroughly tried in Kansas and partially tried in Massachusetts. In neither state is there a central board, but the members of the local boards are appointed by the governor and may be removed by him. This is the reason for placing them among the state officers. It is quite doubtful if the laws are better executed by this arrangement. In actual practice it is found that the governor, as a rule, appoints in each city the kind of a commission the majority of the citizens wish. If a commission is appointed, not backed by the mass of the people, arrests and convictions are very difficult to obtain. In Massachusetts the interference of the state with the right of the locality to appoint its own police is confined to the cities of Boston, Taunton, and Fall River. Much complaint is made in Boston, by Democratic papers at least, that such an arrangement takes from the city the right to manage its own affairs. So long, however, as the city is Democratic and the state outside Republican there need be little expectation of a change.

No one can glance over the foregoing activities of the commissions without remarking their varied and important character. They reflect the complexity of modern life and suggest the imminence of a government paternalism more far-reaching than our country has known in the past.

It is clear that such delicate and difficult duties as those described can be rightly performed only by experts. Technical training and skill, not party service, must be the criterion for the personnel of the commissions. If party service determines, one of two things will happen: either the work will be badly done and great interests will suffer, or else an expert will be employed to do the work that should be done by another, and the state must pay two salaries when one would suffice. The principle here involved has been particularly illustrated in the affairs of

our cities. President Eliot remarks, in his "American Contributions to Civilization," that "the failure of the democratic form of government has occurred chiefly in those matters of municipal administration which present many novelties and belong to the domain of applied science, such as the levying of taxes, the management of water supplies and drainage systems, the paving, lighting, and cleaning of highways," etc. After calling attention to the high degree of scientific training which such matters require, he notes "the antiquated methods of municipal administration, and particularly the short and insecure tenures for the heads of departments," as being responsible for "the greater part of the municipal evils which are bringing discredit on free institutions."

Much that he says can be applied with equal force to the state governments. Massachusetts, it is true, is far in advance of most of the states in the care exercised in choosing officers. Here experts are usually preferred to politicians, and competent officials are retained for long periods. Even Massachusetts, however, has something to learn along these lines.

Having considered the origin and duties of the boards and commissions, attention should now be turned to the relations of these new organs of government to other and older features of the general framework of the state. We should know how they are articulated with the executive, legislative, and judicial departments, as well as their relations with the local government.

III. Relation of the Boards and Commissions to the Governor and the Legislature

State commissions, whether composed of several members, usually three or more, as is generally the case, or of only a single commissioner, are constituted through appointment of the members by the governor, subject usually to confirmation by the Senate. Reports are made in some cases to the legislature, in others to the governor.

It frequently happens that the law organizing the commission is so expressed as to give the governor, after making the appointment of its members, no further control over the actions of that body. The power of removal either is denied him, or is hedged about in such a way as to make its exercise practically impossible except for the grossest malfeasance. Often the legislature has granted these commissions almost complete power in their sphere, and placed in their hands the uncontrolled expenditure of large sums of money. On their appointment by the governor they are launched in their orbit with practically no one to restrain or limit their action within the law. The governor's reputation may suffer by their action, yet, as he has practically no power of removal, he is helpless, except so far as he may direct public attention to the wrongdoing. In effect, the commission system establishes a fourth department of government directly responsible neither to the people, for the members

are seldom elected; nor to the legislature, for it does not appoint or remove; nor to the governor, for, though he appoints, it is seldom he has the power of removal.

Of the changes that have taken place in the structure and function of the state government during the century, none seems more striking or more suggestive than the growth of this fourth department of government. Of course the commissions are intimately connected with the three traditional departments in certain ways, — e.g. appointment, reports, etc., — and are dependent upon them in an important respect for supplies, etc.; nevertheless, they have a field of their own, an orbit traversed only by themselves.

In Massachusetts, where the system has attained its fullest development, complaints are frequently heard of the multiplication of boards and commissions, of their failure to work together, of their irresponsibility, and the expense necessary for their maintenance; but one who studies the signs of the times will hardly expect that the functions assumed by these organizations will be given up by the state. Most of them have clearly demonstrated their usefulness.

The growth of the commission system stands in intimate relation with a clearly discernible tendency in the character of the governor's position. While the office of President of the United States has been growing in power since the adoption of the Constitution, the office of governor in the states has been decreasing in importance. The reason is, in large part at least, that with the growth of administrative work on the part of the national government has gone a corresponding increase in the influence of the President. Usually Congress, when establishing new administrative features, has placed them under the President's direction; and as he has had, during almost the whole period, full power of *removal* as well as of appointment, he has been enabled personally to control and direct the whole administration from top to bottom. Very different has been the history of the governor. Whether from jealousy or from distrust, it has been the almost invariable practice for the legislature to retain in its own control a considerable amount of administrative work; and what has been transferred to the executive has been given to him with qualifications.

A reversal of this policy is strongly advocated in some quarters, and a vigorous effort is making to rehabilitate the governor, — to make him not merely the nominal but the real head of the administration, responsible for its doings, and able to carry out a consistent and comprehensive policy. It is not sufficient, the argument goes, to give him merely the power of appointment: it is necessary that he have also the power of removal. If we believe, as we claim we do, in the old Montesquieuan view of the necessity of a division of the powers of government among three departments which shall be independent of one another and sufficiently powerful to act as a real check upon one another, something must

be done to raise the executive from the position of innocuous desuetude into which it is slowly sinking.

To make the governor the real head of the growing administrative organization that is seen in the boards and commissions, would greatly strengthen his position, and at the same time do away with this *fourth department*, composed of independent administrative bodies, which seems to have no true place in our system of government, and which prevents the proper working of our system of checks and balances.

IV. Relation of the Boards and Commissions to the Courts

It is important to know the legal status of these new organs of government. They have occasionally come in contact with the courts: how have they fared? May a legislature delegate such important powers as are now exercised by many commissions? Does the legislature itself possess the powers which commissions claim? If the legislature does possess them and may delegate them, are there restrictions in the United States Constitution or elsewhere on their exercise by these commissions? Such are the more important questions that present themselves on any extended examination of this subject. These various questions I now propose to answer, so far as possible, in the words of the court. The first question is that as to the right of the legislature to supervise, regulate, or manage the various matters that have been intrusted to boards and commissions.

The Supreme Court of the United States, in the famous case of Munn *vs.* Illinois,[1] laid down this principle in the course of their decisions:

> When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

Certainly this is a very broad doctrine, and seems sufficient to cover the different interests represented by the state boards and commissions. It has not gone without question, however; and in the case of Budd *vs.* N. Y.,[2] decided in 1892, the case of Munn *vs.* Illinois was reviewed and adhered to. But there was a strong dissenting opinion, and the following extract will give the point of view and ground of objections:

> The vice of the doctrine is that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when and only when the use is one in which the public in its organized capacity, to wit, the state, has a right to create and maintain, and, therefore, one which all the public has a right to demand and share in. The use is public, because the public may create it, and the individual creating it is doing thereby and *pro tanto* the work of the state. The creation of all

[1] 94 U. S. 113. [2] 143 U. S. 517.

highways is a public duty. . . . But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. . . .

The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not, with equal reason, regulate the price of all service, and the compensation to be paid for the use of all property? And if so, "Looking Backward" is nearer than a dream.

This view was not, however, the view of the court, and we must conclude, from the above discussion, that the legislature possesses the power in question. The next point to be considered is its right to delegate the exercise of the power to boards, commissions, or officers.

In the case Railroad Co. *vs.* Gibbes,[1] decided by the United States Supreme Court in 1892, the question of compelling the railroad companies to bear the expense of maintaining a state railroad commission was under consideration. The court, after showing that the provisions of the law assigned to the railroad commission certain duties, which, when "properly discharged, must be in the highest degree beneficial to the public, securing faithful service on the part of the railroad companies, and safety, convenience, and comfort in the operation of their roads," proceeded to state his opinion that "the state had, without doubt, the power to prescribe the regulations mentioned, because, though the railroad companies were private corporations, their uses were public." It then uses the following language, of special importance to the point under consideration:

The regulations may extend to all measures deemed essential not merely to secure the safety of the passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discriminations. It may embrace a general supervision of the operations of their roads, which may be exercised by direct legislation, commanding or forbidding, under severe penalties, the doing or omission of particular acts, *or it may be exercised through commissions specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion.* . . .[2] When exercised through commissions, their services are for the benefit of the railroad corporations as well as of the public. Both are served, . . . and there would seem to be no sound reason why the compensation of the commissioners in such cases should not be met by the corporations supervised.

As bearing directly upon this point, Professor Thayer's comment will be of great interest:

It may be doubted that there is any difference between the action of a legislature and that of a legislative commission as regards the questions involved

[1] 142 U. S. 386. [2] Italics are mine.

in such a case as Chicago, etc., Ry. Co. *vs.* Minnesota, when once it is clear that the legislature has really undertaken to confer upon the commission the power in question. If the legislature can exercise it, it would seem that it may confer on the commission a like authority.

Yet, as regards subordinate bodies, there is always the question of construction as to what authority has, in fact, been conferred on them; and in passing on this, established common-law principles are applicable, which ordinarily, and in the absence of clear legislative intentions to the contrary, enable the courts to control their action as not authorized by the legislature. Similar action by the legislature itself can be condemned only if it be unconstitutional.[1]

Having now the opinion of the highest court in the land on the powers of the legislature and its right to delegate these powers, we pass to a consideration of the limitation on their exercise in the hands of a commission.

In the foregoing quotation from Professor Thayer, the point is emphasized that the powers of the commissions will be construed in the light of established common-law principles unless the legislature clearly expresses its intention that the principles shall not hold. We find in the same line the Supreme Court insisting, in Chicago, etc., Railway Co. *vs.* Minnesota,[2] that the provision in the United States Constitution that no person shall be deprived of life, liberty, or property without due process of law, prevents a railroad commission from passing finally on the rates to be charged by a railroad company when no judicial inquiry is instituted, that is, when there is nothing that corresponds with due process of law. The Minnesota statute that established the railroad commission was interpreted by the supreme court of that state as providing that the rates settled upon by the commission should be final and conclusive as to what are equal and reasonable charges, and that there could be no inquiry by the courts as to the reasonableness of said rates. Accepting this interpretation of the statute as correct, the Supreme Court of the United States declared:

> It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefore, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. . . .
>
> No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission

[1] Thayer, Cases in Constitutional Law, I, 672. [2] 134 U. S. 418.

investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at.

The principle here enunciated as applying to railroad commissions will, of course, apply to any other commission that tries to exercise the power of regulating charges. It is clear, therefore, that the federal courts stand as a bulwark against any final deprivation of life, liberty, or property by a commission, and that the actions of the commissions are subject to review by the courts. Undoubtedly this is a serious, though probably a salutary, restraint. The difficulty is that the court must judge a mass of detailed information that it has neither the time nor the expert knowledge to consider properly, and a conscientious attempt of the judges to master the problem gives the opportunity, so frequently abused, of delaying the operation of the commission's orders in a given case.

V. Relation of the Boards and Commissions to the Local Governments

In the establishment of all the state commissions, and especially of the executive commissions, there is observable a decided movement toward centralization. It is curious to note, in this connection, that in the countries of the Old World where centralization has been carried farthest, namely France and Germany, there is a decided movement toward decentralization.[1] It is probable that extreme centralization and extreme self-government of localities are both undesirable, and a moderate degree of each is preferable. This, it seems to me, is the conclusion derivable from experience in the four countries of the world where government and administration have received the most intelligent and continuous consideration. Thus, it is going too far in the direction of centralization, it seems to me, when the control of the local police is taken from the locality; and too far in the direction of local self-government when great thoroughfares, in which many communities are interested, are left to the unaided and usually unintelligent management of a nonprogressive locality. There is a mean here, as elsewhere, and it is the place of the statesman to discover it. He must find the point where local self-respect and initiative are preserved, and yet the general interests are sufficiently secured.

The experience of the Massachusetts Highway Commission presents something of value in this connection. It has been so universally the custom in this country to make the roads a local matter, that intrusting to the state a share in construction and management was pioneer work,

[1] Now while the tendency of the United States and England has been toward administrative centralization, the tendency in France and Germany has been toward administrative decentralization. Within the last twenty years many matters which formerly were regulated by the instructions of the heads of departments have been put into the hands of the officers of the localities to be attended to in their own discretion.— Goodnow.

with no precedents.[1] Careful consideration was given to the best way of preserving local interests in the roads, and also of preventing that "pauperizing" of localities so apt to occur if the state assumes the whole burden. The following points embody the solution of the problem that commended itself to the framers of the act organizing the Massachusetts Highway Commission:

1. Road construction is undertaken by the state commission only on petition by local authorities.

2. One fourth of the amount expended by the state must be returned within six years by the counties in which the work is done.

3. The localities are encouraged to bid for the construction of the roads in their areas, and are given thirty days to decide whether they will elect to do the work at the terms proposed by the commission. If they do not so elect, private contractors are permitted to bid.

The value of these provisions will be recognized at once. Not only will the attention of the people be turned to the condition of the highways in their vicinity, but, if they undertake the work, much valuable experience will be obtained in scientific road building; for all work must be done according to the plans and under the supervision of engineers sent by the state commission to reside at that point until the work is completed. Again, by sharing the expenditure with the state, the locality will have a deeper interest in the road, and feel very much as if it were paying its own way; for even a fourth of the whole cost of construction will involve a perceptible increase in the tax levy.

After a short experience it was found desirable to simplify the process of petitioning for road construction. It has also been made easier for towns and cities to undertake for themselves the work of construction, by repealing the rather ill-advised check on the commission's power to contract. The first act stated that the town or city could not be allowed more than 85 per cent of the original estimate of cost of construction made by the commission. A later law leaves the matter of terms without any such limitation.

Massachusetts has made other attempts than the one just noted to adjust properly local self-government and state control. The most interesting, perhaps, are the various metropolitan commissions, that have for their object the unifying of the action of several communities grouped around a great city. The duties and powers of these commissions have already been described, and I refer to them here simply to note the difference between the solution adopted by Massachusetts and that adopted by New York and Illinois for the same problem. In the latter states, Chicago absorbed its environs bodily, and New York did likewise. Boston bearing, it is true, somewhat different relations to its near-by towns, has been content to secure united action in certain important matters by

[1] New Jersey, it is true, had made some beginnings in general road improvement, but the plan did not involve centralization.

the appointment of these metropolitan commissions, but has left the several towns free to manage their own local affairs. This would seem to be following closely the example of our national system, and it is quite in line with the idea of the golden mean between state and local control.

VI. The Future of the Commission System

It seems hardly possible that the present system of almost independent commissions can be permanent. They fail to work in harmony, to cooperate, to give each other the benefit of experience that might be helpful. In the absence of a central control there is no way to coördinate the duties of the several boards. The present seems to be a transitional stage, arising from the gradual assumption, by the state, of new duties without an adequate realization of all that is involved, and without any general plan. One can see in it a certain likeness to conditions just before Napoleon I assumed the government of France, and I am tempted to predict an outcome similar in nature to the administrative system he established. The French precedent is thus described by President Woodrow Wilson:

> The Convention and Assembly had endeavored to direct affairs through committees, commissions, councils, directories, — through executive *boards*, in a word. For such instrumentalities Napoleon substituted single officers as depositaries of the several distinct functions of administration; though he was content to associate with these officers advisory councils, whose advice they might ask, but should take only on their own individual responsibility. "To give advice is the province of several; to administer, that of individuals," says the maxim which he engraved on the pediment of the administrative arrangements of France.[1]

It will be noticed that Napoleon provided for advisory councils. Perhaps this would solve the problem of securing the advice and assistance of persons whose experience or talents would be of great value to the state, but who cannot be induced to enter its service as paid employees. If such persons could be associated, as an advisory body, with the executive head of each department or division, the double advantage of wise counsel and efficient administration would be attained.

Such a solution of one great problem must be accompanied by some scheme for the proper grouping of the commissions into executive departments. No doubt a number of possible combinations might be proposed. I suggest the following scheme, which provides for all the important boards, and groups together those handling similar matters. It is based on the existing conditions in Massachusetts:

Department of Education: Public Schools; Nautical Training; Free Public Libraries; Normal Schools.

Department of Examinations: Civil Service; Dentistry; Medicine; Pharmacy; Pilots.

[1] The State, rev. ed., p. 214.

Department of Manufactures: Labor Statistics; Arbitration and Conciliation; Inspection of Manufactures; Lumber; Liquors; etc.

Department of Agriculture: Agriculture; Cattle; Dairy; Horticulture; Inland Fish and Game.

Department of Corporate Control: Railroads; Gas; Telephone; Street Railways; Banks; Insurance.

Public Works: Highways; Parks; Sewerage; Buildings; Land; Harbor.

Department of Charities and Corrections: Lunacy, Feeble-Minded, Blind, etc.; Charity Work; Prisons, Reformatories, etc.

Department of Public Safety: Health; Fire Marshal; Police.

By way of summary and conclusion, the whole situation may be thus put:

The people of the several states, especially those in which there is an active commercial, political, or intellectual life, are steadily insisting that their state governments shall take a more active part in affairs, shall be a positive force in creating better conditions and regulating old ones. They have been feeling their way by the establishment of commissions charged especially with certain duties of this nature.

From the first, appointments to the paid places have to a considerable extent been made without due regard to fitness or special ability. The nonpaid places have frequently secured excellent men; but because these have been unable or unwilling to give their whole time to the state, certain evils have arisen from the partial service. Gradually, however, there is arising a demand for the best men and for their whole time. When this demand becomes sufficiently strong to insure adequate compensation, permanent employment, and considerate treatment, the state will be able to secure the service it needs.

Meanwhile a movement for consolidation of the boards into departments has been growing. Eventually, departments will be formed in most states, I believe, and perhaps there will be attached to them advisory councils, made up of citizens whose wisdom and influence could not otherwise be secured. The governor will be the head of the administrative system, and responsible for its proper management. Like the President of the United States, he will have the power of removal.

How far the state will go in its supervisory, executive, and examining work, no one can predict; but the end is still far off, and I look for a great extension of state activities. Yet it is to be hoped that it will not go so far as seriously to check individual initiative nor weaken personal responsibility.

THE PUBLIC SERVICE COMMISSIONS LAW OF NEW YORK[1]

By Thomas Mott Osborne

The events which led to the passage of the Public Service Commissions Law in the state of New York are of such recent occurrence that it might not be unnatural to assume that they are still fresh in the minds of every one interested in public affairs; but in our country political memories are so very short that it is never safe to assume a clear recollection of the most elementary facts in the situation of even two years ago. Four years is a political generation — the life of a national administration — and our whole political thought and action is thereby chopped into very short units.

In New York state, with its governor's term of two years, our political memories tend to be even shorter than in national affairs; and certainly it seems as if recent events had moved with almost enough rapidity to justify our vagueness. It is but little more than three years since the struggle for control of a great life-insurance company brought about a sort of family quarrel among its directors; that quarrel uncovered a grave condition of affairs, in which of necessity the public was seriously interested; that interest led to a legislative investigation; that investigation brought to the front an experienced, able, and fearless lawyer who had hitherto lived but little in the public eye; and that able lawyer probed the life-insurance scandals with such marked ability, high professional standards, and remorseless vigor that, when the Republican party of the state, crippled by savage quarrels among its leaders and much discredited by its recent record, looked about for a candidate who could win the election of 1906, it recognized that he was the one man who could defeat the political combination which had been formed against it.

It certainly is no secret that among the states of the Union, New York has endured its full share of that reckless disregard of the rules of sound finance which has characterized the rapid development of our public utilities in the last fifty years. In fact, we have had rather more than our share of the violation of monetary sanity and economic morals (to say nothing of economic decency) that has accompanied that development. The scandals attendant upon the earlier operations of the New York Central Railroad, the performances of Jim Fiske and his printing press in the manipulations of the Erie, the story of Jacob Sharpe and his Broadway franchise, and last but not least the Interborough-Metropolitan merger, are only the more striking chapters in a long story of intrigue, corruption, and disgrace. The annals of almost every city in the state can show their own version of the combination of scheming promoters, selfish investors, uninterested citizens, and greedy politicians; their own

[1] From the *Atlantic Monthly*, April, 1908. Reproduced by permission.

record of valuable rights given away without foresight and often with the most revolting concomitants of bribery and corruption.

It would, of course, be grossly unfair to blame the condition of things which resulted entirely upon the corporations which were formed to develop the public utilities and to which the public grants or franchises were given. At the best they were developing services of vast importance to the communities; at the worst we can only say that it seems to be human nature with too many people in the business world to grasp at what seems to be for their greatest pecuniary advantage, without troubling themselves very much about general ethical considerations. On the other hand the "plain people" — the very ones who ought to be most interested in good government — have seemed to be the very ones most unconcerned.

For a number of years, however, there has been developing a distinct change in the temper of the public mind toward such matters. There has arisen a renewed sense of the hatefulness of public dishonesty, a renewal of belief in the public trust involved in public office. If some of the manifestations of awakened conscience seem rather too overstrained and sensational to be quite sound or lasting, yet such states of mind often aid in producing important political results — as was the case in the autumn of 1906.

At that time there seemed to come about a political crisis as sudden as it was unexpected, although to the more farsighted it had been in truth preparing for several years. A not unnatural sense of injury and grievance had grown up as the public had followed the testimony in different investigations which seemed to open up ever new vistas of corruption; as it had followed the proceedings in the Standard Oil cases; had perused the highly colored revelations of "high finance" — by "one of themselves"; and had watched the proceedings of various reckless promoters and financiers, seeing those favored individuals amassing vast fortunes the origin of which lay in the public franchises which had been procured upon such easy terms.

It is at periods like this, when the people has lost confidence in its servants, in its old leaders, in the very framework of the social structure, — apparently almost losing faith in democratic self-government itself, — and is calling for some political Moses to lead it out of bondage, that there comes the moment eagerly awaited by the demagogue. Trading upon the righteous anger of the just, upon the prejudices of the unreasoning, upon the cupidity of the mercenary, upon the timidity of the politician, the demagogue becomes suddenly a menace to society — a menace, not because he may not be entirely right in his analysis of the situation, but because from the nature of the case he is a destructive and not a constructive force, and because he is always seeking, not how to apply genuine remedies, not how to safeguard the interests of the mass, but only how to turn the situation to his own personal advantage; a menace,

because, even if he is honest in his aims, he has faith in progress by revolution rather than progress by evolution, believing in miracles rather than in science.

It is distinctly to the credit of the people of New York state that in the midst of a genuine crisis of political feeling there should have been shown such careful weighing of all considerations before political action; that amid forceful appeals to passion and prejudice, based upon undoubted public grievances, there should have been upon both sides so much honest endeavor to think clearly and act justly. Probably at no election ever held in New York state was there so complete a breakdown of the ordinary political barriers. Republicans by thousands voted the Democratic ticket in whole or in part; Democrats by thousands voted the Republican ticket in whole or in part. While outwardly old party forms were maintained, in reality party ties in a large measure ceased to exist.

As the campaign developed it became a genuine choice between one who preached the gospel of disorder,[1] under cover of a righteous outbreak against existing conditions on the one side, and on the other an exponent of calm, sane, and orderly progress. And it is a humorous illustration of the irony of history that the Republican party, which of the two political parties may fairly be held far the more responsible for the evils of the situation, should have been the one to place in nomination the genuine reformer; while the Democratic party should have thrown away the chance of a generation by allowing its opponents to play once more the old game so aptly described by Disraeli at the time of the repeal of the Corn Laws, when he averred that Peel had caught the Whigs in bathing and had run off with their clothes.

The result of the election was to seat in the governor's chair an able and successful lawyer, a Republican, who aims always to place state interests before partisan advantage, a man of the sincerest and most confirmed honesty, of a high ideal of public service, of determined convictions yet open mind; moreover, a man who realized fully that his election was simply an expression of public confidence in him personally in the midst of his party's defeat. Governor Hughes realized to the full the political difficulties of the situation and the dangerous temper of the public mind, along with the genuine grievances which lay behind and were the cause of it; so he at once set himself to grapple with the problem in the calm temper of a true statesman. The Public Service Commissions Bill was the outcome.

The law as it was passed contains five articles, the main points of which may be briefly touched upon.

1. By Article One the state is divided into two districts, with a separate and independent commission for each. The first district includes what is

[1] "As between Rottenness and Riot," said Mr. Bourke Cochran, when defending his candidate at the Buffalo Convention, "I prefer Riot." A unique way, certainly, of recommending a nominee for governor.

known as Greater New York, — the four counties of New York, Kings, Queens, and Richmond (or New York City, Brooklyn, Long Island City, and Staten Island), — and the second includes all other counties in the state. This division, suggested by the great difference in character of the problems in the two districts, has been already justified by experience.

The ten commissioners, five for each district, are appointed by the governor subject to the approval of the Senate, but removable by the governor alone. They must have no official relation to any corporation subject to the provisions of the act, nor own stocks or bonds therein. Neither shall they ask the appointment of any person to office by such corporations or receive from them any pass or reduction in fare.

Each commission appoints its own counsel, secretary, and minor employees, and each single commissioner has full power to hold investigations and hearings, although an order must be approved by the commission before it becomes operative. The commission is not bound by the technical rules of evidence, but is free to get at the facts in the quickest and simplest way possible. All witnesses are duly protected, and the commission can force attendance and secure testimony, refusal constituting a misdemeanor.

2. Article Two prescribes the duties of common carriers, which term includes, according to the wording of the act, "all railroad corporations, street-railroad corporations, express companies, car companies, sleeping-car companies, freight companies, freight-line companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property."

Common carriers shall furnish to the public "such service and facilities as shall be safe and adequate and in all respects just and reasonable"; and "all charges made or demanded . . . shall be just and reasonable and not more than allowed by law or by order of the commission." They shall provide proper switch and side-track connections, and shall file and keep open for "public inspection schedules showing the rates of fare and charges for the transportation of passengers and property."

There shall be no special rate, rebate, or unjust discrimination of any kind; no "free ticket, free pass, or free transportation of passengers or property," exception being made of officers of the railway and certain other specified individuals. But this provision is not to prevent the issuing of mileage or commutation tickets.

There must be sufficient and suitable cars for freight in carload lots; sufficient cars and motive power on railroads and street railroads to meet all requirements for the transportation of passengers and property; the commission being expressly given power to make suitable regulations for the furnishing of freight cars and for demurrage charges.

3. Article Three continues the provisions relating to common carriers, dealing especially with the powers of the commission for carrying the provisions of Article Two into effect.

Power is given to the commission:

(*a*) To examine into the general condition, capitalization, franchises, and management of all common carriers;

(*b*) To examine all books, contracts, records, documents, and papers, and to compel their production;

(*c*) To conduct hearings and take testimony on any proposed change of law when requested to do so by the legislature, by the Senate or Assembly Committee on Railroads, or by the governor;

(*d*) To prescribe the form of annual reports;

(*e*) To investigate accidents;

(*f*) To investigate as to any act done, or omitted to be done, in violation of law or of any order of the commission;

(*g*) To fix rates and service;

(*h*) To order repairs, improvements, or changes in tracks, switches, terminals, motive power, or any other property or device, in order to secure adequate service;

(*i*) To order changes in time schedules by increasing the number of trains, cars, or motive power, or by changes in the time of starting its trains or cars;

(*j*) To establish a uniform system of accounts and prescribe the manner in which they shall be kept.

The approval of the commission is necessary for various things. Without it

(*a*) No construction of a railroad or street railroad, or extension of existing lines, shall be begun;

(*b*) No franchise shall be assigned or transferred;

(*c*) No railroad or street railroad or other stock corporation shall purchase or hold any capital stock of any other road;

(*d*) No stocks, bonds, notes, or other evidences of indebtedness (except notes payable within twelve months) shall be issued;

(*e*) No merger or consolidation of existing companies shall be made; and in case such merger is approved, it is provided that the capital stock of the merger shall not exceed the sum at par of the capital stock of the corporations so consolidated or any additional sum paid in cash.

The penalties for failure to comply with an order of the commission are drastic. Each day's violation constitutes a separate offense, and for each offense the penalty is $5000 if by a common carrier, $1000 if by other than a common carrier. Every individual who aids or abets any violation of an order of the commission, or who fails to obey, or aids or abets any corporation in its failure to obey, is guilty of a misdemeanor. In case the commission believes that a common carrier is violating the law or an order of the commission, it may commence an action to secure relief by way of mandamus or injunction, and the court shall require an answer within twenty days.

4. Article Four applies practically similar provisions to the gas and electric companies. It also provides for inspection of all gas and electric meters. The commission has the right to fix rates upon proper complaints as to quality or price, not only of that supplied by private persons and corporations, but of that supplied by municipal lighting plants as well; it has power to examine the books and affairs of the producers, to approve of all incorporation and franchises, and of all stocks, bonds, and other indebtedness; in short, this article is similar in aim to the preceding, although, having been drafted with less success, it is in places somewhat obscure. It is to be hoped that amendments to the law will soon remedy these defects.

5. In Article Five the act comes to an end with the abolition of the former Railroad, Gas and Electricity, and New York City Rapid Transit commissions, and the state inspectors of gas meters, followed by the necessary provisions for the transfer of records, the continuance of pending actions and proceedings, and the necessary appropriations.

But there has not been mentioned the most vital and far-reaching clause of the bill. In Section 55 occurs the following: "*The commission shall have no power to authorize the capitalization of any franchise or the right to own, operate, or enjoy any franchise whatever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to a political subdivision thereof as the consideration for the grant of such franchise or right.*" In other words, the law decrees that hereafter the grant given by state or municipality shall not be treated as a private asset of the corporation and its value represented in stock, but that the value of the franchise and the increment thereof shall remain forever the property of the state.

To call this law a piece of radical legislation is to speak mildly; it seems to mark an epoch in the history of New York state; for the corporations affected by the stringent provisions of the law are among those upon which the whole structure of our present business system rests. Without the railroads modern commerce would be impossible; without the street railroads our cities could not spread their vast populations out into their ever-growing suburbs, and social conditions would be completely altered; gas and electricity are not merely essential to our comfort, they are necessary to the existing order, — all of these public utilities are vital elements in the lives of every one of us, and a law which compels such a complete readjustment of their relations to the state on the one side and the public on the other is not merely radical, it is revolutionary.

To many people the bare suggestion that state or municipality shall undertake to regulate any business hitherto in private hands is at once denounced as "socialism." I must confess to having only the vaguest notion of what "socialism" is, but judging from the current use of the term it means anything you want the state to do that I do

not want it to do. It has been urged against the Public Service Commissions Law that it is "socialism." Perhaps it is; but people are not going to be frightened by a mere word. Before we begin to tremble, suppose we look the facts squarely in the face and see what this law is intended to accomplish, and recall why it seemed necessary for such a law to be passed. And it might be well for us to disabuse our minds of preconceived notions and prejudices for things as they are, and think rather of things as they ought to be.

The English race, including ourselves as at least a political branch thereof, has certainly never shown any great liking for monopolies. When such were fostered by government and bestowed by royal prerogative they were the objects of popular hatred and the causes of rebellion; and the feeling against them to-day is less strong only because we have felt ourselves to so large an extent free of them. Some of us, to be sure, have seen in the iniquities of our tariff some of the worst features of monopolies; but we have never as yet succeeded in impressing these views very deeply upon the mass of our fellow citizens. The general public, feeling that it owned and could control the government, has been singularly careless and thoughtless in the matter until of late; for it felt that in any event the remedy was close at hand. The old cure for monopolies was a simple one, — abolish government protection and let competition have its way. And in most cases where a monopoly seeks to control the output of some ordinary article of trade or manufacture, this remedy has been successful; and the belief that "competition is the life of trade" has been until lately one of the articles of commercial orthodoxy.

When our great modern public utilities first came into being, they were not recognized as infant monopolies. When a man wished to build a railroad he was regarded only as a daring adventurer who was about to start a new and superior line of coaches on a strange private highway, — merely a new element of competition. It was the same with a gas company, gas being at first only a new-fangled light trying to prove its doubtful superiority over lamps and candles. Electricity was in its turn only a competitor of gas; a street-car line a competitor of the more expensive cab company; an interurban trolley a competitor of the railway. All these were merely new and comparative conveniences which science was putting within our reach, which we could trust private ownership to develop, and which competition would regulate. The ordinary American merchant or manufacturer, intent upon his own business and satisfied if he was making it pay, was also satisfied if he was getting from railroad, express company, telegraph, or telephone the service that his own particular business required; and he was little inclined to question the right of investors, who were bringing to him the business advantage of a very useful public service, to do what he himself was doing, — make as much money as possible on the investment.

And while merchants and manufacturers were thus absorbed and the general public indifferent, what was originally a mere competitive public convenience was fast becoming a public utility; and then, before we realized it, it had become an absolute public necessity. We suddenly woke to find the business world struggling to readjust itself to new and strange conditions, — to the pressure of brutal bigness: enormous railway systems, gigantic mergers, world-wide trusts, accumulators of fabulous millions; the vast scale of the operations seemed in itself terrifying.

The old theory was that railroad or gas company, trolley or power company, under a minimum of public supervision, should be managed like private business corporations, — primarily, if not exclusively, for the financial benefit of the investors. To be sure, under the fostering care of the older generation of railroad manipulators, that theory received some rather severe shocks, and we realized that the investors frequently failed to get their share of the profits; nevertheless, whatever the practice, the theory was still held to be sound. But under the new order, our ideas have changed, as we have seen these great railroad systems utilized by commercial monopolies to fasten their hold upon the public and crush out competition with remorseless vigor; as we have seen valuable franchises secured for favored individuals, all too frequently by methods utterly abhorrent both in law and morals; as we have come to realize the power which lies in the hands of an irresponsible board of directors to stimulate artificially one community while it may destroy another; as the knowledge has been slowly burned into our consciousness that public-service corporations were after all managed by men very human in their weaknesses, greedy for power and wealth, and no more successful in resisting temptation than the rest of mankind. Studying these corporations more closely, we have seen the newer companies — railroads, interurban electric roads, and lighting companies — being managed primarily if not exclusively for the benefit, not of the investors, but of those who could induce investors to invest. A new form of human pest has thus made its appearance, — the promoter; and a new science of commerce and banking has made its appearance, which I think has not been named yet. "New," did I say? To some of us these new friends look most uncommonly like our old acquaintances Dick Turpin and Jack Sheppard in a fresh disguise; and the new commerce and banking have a most unseemly resemblance to an old amusement known as highway robbery. Wordsworth's Rob Roy was not the first to invent that

> Good old rule . . . the simple plan,
> That they should take, who have the power,
> And they should keep who can.

Nor has he been the last.

In this latest variation of the old game the interests of the investor and the interests of the public alike have been overlooked; but it is all a very logical outcome of the original mistake, — the theory that a public utility is a mere matter of private business. We should not therefore expend our rhetoric against the corporations, — they were often more sinned against than sinning; for had it not been for our own blindness they would never have been left to pursue their objects too frequently in what now seems to us a highly predatory manner.

If it has taken us a long time to realize that public-service corporations are in their nature monopolistic, it is also taking us a long time to get over the idea that the safeguard of the public is competition. Therefore, legislatures have chartered rival railroads, and common councils have granted franchises to rival trolley, gas, and electric companies, only to find that almost inevitably, after a brief period of cutthroat competition, with threatened failure to both companies, there was a consolidation, overcapitalization, and relatively, if not actually, higher charges; and thus for the poor consumer the last state was worse than the first.

In New York we seem at last to have waked up to the fact that in these public utilities there not only never has been any genuine competition, but from the nature of the case there never could be; we are also learning that if justice is to be done to the public as well as to the corporation, — to the buyer as well as to the seller, — something else must be substituted in place of competition, and that something we are now to try in the shape of state regulation.

The policy of state interference in any business is not one that we naturally take kindly to in this country, and we have certainly not been hasty in trying it in New York state. So long ago as 1879 the Hepburn Committee investigation pointed out some of the evils of rebates and other railway practices as clearly as has ever been done, yet it was 1906 before the legislature took any effective action in regard to the matter; and our municipalities as well as the state have been very slow to exert their powers. Of course opinions will continue to differ as to the advisability of state interference, but in the judgment of those who read best the trend of the public mind, the time has gone by when there can be much dispute over the main contention; the only question is how far the state shall go. For the exact point where private action may best end, and the community itself should take hold, has certainly not been discovered yet; nor is it likely ever to be settled, for social conditions shift quite as rapidly as social experiments are made, and where can we draw the dividing line?

Some lawyers will tell us that there is no dividing line in this particular matter, that there is no essential difference between a public-service corporation and any other, and that it is simply a question of public policy as to what business the state shall undertake to regulate and what it shall leave without interference. Others will say that however hard it is

to draw a dividing line, yet there is certain territory which is quite obviously on one side of the line, wherever the line may be, and certain territory quite as obviously on the other. Also it seems to be true that a certain business may stand on one side of the line in one generation and occupy the other side in the next. For many centuries it was public policy to subject the innkeeper to stringent regulation in the public interest; but with the growth of modern conditions it has ceased to be necessary, and a modern hotel company can hardly be classed as a public-service corporation. On the other hand, when a virtual monopoly in the supply of some necessity of life has come into existence, that business certainly is drifting over the line into territory where some sort of public regulation seems inevitable.

All the businesses which are placed under the jurisdiction and supervision of the New York Public Service commissions are, more or less, monopolies depending upon some form of public grant or franchise. Not only are our railways great state highways, but the companies that own them own also the means of traversing them and of transporting goods along them. Our street railways occupy the public thoroughfares under exclusive grants from municipalities. The gas companies must get permission from the city to dig up the public streets, and electric light companies to erect their poles. Express, freight-line, and sleeping-car companies only supplement the work of the railway. Not one would be able to exist except for the public grant which is its foundation; it is therefore to the state that we must now turn for relief against the power of the monopolies which have been allowed to rise upon that foundation.

When we come to a consideration of these franchises the first thing we find is, that, although in most cases the corporation had paid nothing to the state or municipality for the franchise, yet no sooner has the franchise been secured than it has been capitalized, often at an enormously inflated valuation, and the resulting securities have been marketed in the same way as those for which good solid cash has been paid.

Now, as a matter of fact, the value of a franchise is very fluctuating, — a thing impossible to fix. The franchise of a nonexistent railroad is of no inherent value; on the other hand the value of the same franchise, after fifty years' development of the road and growth of the communities about it, may almost exceed imagination; but since the state has claimed the right to regulate rates, thus demolishing the theory that the railroad conducts a private business, the value of every railroad franchise in the state as a basis for an issue of securities is very materially diminished if not obliterated.

If the franchise is something of value, the state should certainly not give it away; if it is of no value, then the corporation should not capitalize it; but to secure it for nothing and then capitalize it, is "special privilege" with a vengeance. The worst of the matter, however, is this, that when the corporation proceeded to capitalize the franchise, upon

the theory that it represented an asset upon which returns in the shape of dividends should be paid, — the same as if it were money invested in the enterprise, — the corporation was on the one hand receiving from the state a gift of more or less value, and on the other forcing the state to pay perpetual tribute upon the very thing it had given away — to the tune of many times its actual value when the promoters were clever enough to "discount the future" in their issues of stock. When you come to dissect the matter and look it over coolly, it does seem as if this were on the whole the most skillful confidence game which has ever been worked on the public; for the experienced financier, after capitalizing his franchise, could unload the watered securities on the "widow and orphan," and place the resulting cash in "gilt-edged" investments far removed from inquisitive legislators and public-service commissions.

This is not saying — and let this point be made quite clear — that there have not been many noble and high-minded men connected with our public-service corporations; that the development of public utilities has not been of immense value to the community; nor that they have not often been conducted with the highest motives of philanthropic enterprise. But it is an assertion that the theory underlying the treatment of the franchise was wrong and the system built upon it was bad, and that the time has now come to open our eyes and look facts squarely in the face. When we do so, we find that the right of the legislature of state or city to give away a franchise in perpetuity cannot be successfully defended.

The legislature is the agent of the existing population, and its members, as our accredited representatives, may barter away present rights, yours or mine of to-day; but they may not dispose of rights which belong to our children and our children's children as much as to us, for the future is not ours to give. They may allow private development and management of public utilities for the sake of immediate public advantage, and any such investment should be protected from unjust and unreasonable competition, and should be held sacred for the investors; but the franchise itself is something which may not be given away, because it is not within the province of the legislature to give away that which does not belong to the *existing* community. A franchise granted by the legislature of fifty years ago, for instance, belonged then to us of to-day quite as much, if not more, than to our grandfathers, who handed it over to some railroad in perpetuity; it belongs to us now, as it will belong to our grandchildren in their turn. The action of the legislature of two generations ago in giving away our birthright is not morally a binding contract upon us to-day, when it comes in conflict with present or future public interest; and the vested rights of the private inheritors of that franchise will not finally stand when they come in conflict with the vested rights of the state.

Some people will tell you that the state is nothing more than the sum of its inhabitants; and that when you speak of the state as more than that, you are using the term of a sentimental abstraction which does not

exist. Yet any man who can feel the thrill of patriotism knows that this is not so. *The state is the future;* it is the sum of its inhabitants not only of to-day, but of to-morrow, the day after, and so on to the end of time. And it is exactly the rights of the state of the future that have been forgotten in our dealing with the public-service corporations.

There are, therefore, three parties in interest: the public, the community of to-day, demanding fair treatment for every individual, large manufacturer or small, rich and poor alike; the public-service corporation, demanding just and liberal treatment for those who are willing to invest their capital in developing a public utility; and the state, standing for the whole community in its continuing capacity from generation to generation, — from now into the far distant future, — and demanding that these great questions shall not be considered as of to-day, but that the decision in all matters of public policy shall take the road which leads often away from immediate results toward the best results for the time to come. And of these interests the last is by no means the least important. "Conscience and the present constitution of things are not corresponding terms. It is conscience and the issue of things which go together."[1] It is because of its endeavor to restore a proper balance to these three interests that the Public Service Commissions Law marks so great a step in advance.

A few words in closing as to the practical operation of the law in New York. The commissions have been in existence only nine months — and that is a short time for a revolution to be consummated; but already experience has shown the immense value of the law. Merchants and manufacturers have a powerful tribunal before which they can plead for justice and efficiency; any individual with a well-grounded complaint against a corporation can have it brought to its attention by the commission far more forcibly than he himself can bring it; the issues of stocks and bonds by these corporations are for the first time subjected to rigid scrutiny, and it is safe to say that very little water will leak into such securities in the future; — in every way the rights and interests of the public are being safeguarded as never before, and the public is becoming aware of the fact. For the first time in their history these great corporations realize fully that there is a higher power above them, — a power to which the public can now appeal; they have been shorn of their ability to dispense life or death to businesses, to tyrannize over individuals, or to ignore the interests of the public, for above them is the state, demanding justice and fair treatment for every one of its citizens, and enabled to enforce its demands.

It is only fair to add that on their part the corporations have shown both good sense and good temper in accepting the law graciously, and doing all in their power thus far in carrying out its provisions and the orders and requests of the commission. Many a complaint never reaches the commission; the complaint is remedied by the corporation as soon as

[1] Davison; quoted by Matthew Arnold in Literature and Dogma.

it is made known. In truth, the wiser among the corporation managers see plainly that the law will be their best defense against dangerous legislation; that the commission will stand as a barrier against injustice to the corporations on the one hand, while it affords relief to the public against injustice on the other.

It will lead to a safer and better condition of things all around: the public will see that its rights are safeguarded, and demagogic appeals will lose their force and effectiveness; the corporations will be protected against destructive competition and blackmail, and assured of a fair return on honest investment; hence should result a return of public confidence in the securities of the corporations, — which ought in turn to be as good and conservative investments as any municipal bonds. There will be two classes of people, but I think only two, who will suffer from the law, — those among the capitalists and promoters who are too greedy to be content with their fair share, who wish to reap where they have not sown; and the demagogues and agitators who will feel themselves cheated out of their best weapons of attack. But if both these classes could be put permanently out of business the world would be duly grateful.

That all these desirable things will come at once no one will expect; that they are coming, and that the Public Service Commissions Law will justify the expectations of its promoter, many of us fervently hope and believe. That act is upon the statute book not merely because a governor of New York wished to alter the law, but because public opinion justly demanded a change in existing conditions. The old footing of the public-service corporations was intolerable; something new had to be substituted for the false and outworn theory of competition in order to protect the public and the state. Governor Hughes recognized the voice of the people demanding reform, and the result was an effective piece of legislation which fairly entitles its author to be considered as that rather rare personality in American politics, — a constructive statesman.

For my own part, and speaking as a Democrat, I welcome a law which seems to me not only essentially Democratic in principle, but in line with frequent declarations of the party policy — an effort to root out one of the most insidious forms of special privilege, and to regulate, in the name of the people, these great monopolies which have been for many years disturbing factors in our social and political development.

RAILWAY REGULATION[1]

By Governor La Follette

"With respect to the scope of a law creating a State Railway Commission, I believe that the most careful and thorough investigation upon your part will lead to the conviction that the commission should be invested

[1] Message of 1905.

with power to enforce an adequate and efficient service, always taking into consideration the circumstances and conditions with respect to the town, city, or section concerned. It is as necessary that the efficiency of the service should be under the control of the state as it is that there should be government regulation of transportation in any respect. The character of the service is quite as important to the business interests and to the people of every community as is the cost of the service.

With respect to the regulation of rates, I have no doubt that you will wisely determine to clothe the commission with full power to establish a rate. A sufficient objection to limiting the power of the commission to fixing maximum rates is that the railway company can still make unjust discriminations between shippers and communities, by making them special rates below the maximum rate. The exercise of the power to make an absolute rate will furthermore insure stability in rates, which is an important factor in the conduct of every business. The orders of the commission that establishes a rate should at once carry the rate into effect, to continue until such a time as the commission shall otherwise order, or the courts of appeal otherwise determine, if an appeal should be taken.

While the commission should doubtless be clothed with power to promulgate entire schedules of rates and classifications, it may well be questioned whether such action upon its part should be made mandatory. It would appear to be the more prudent course to make it the duty of the commission to establish rates with respect to any one product or shipment, or to particular lines of merchandise, or to specified commodities, as from time to time their importance may demand consideration. Thus, without delaying action for an investigation covering the entire field of state commerce, this discretionary power would enable the commission to afford relief wherever it is most urgently required. Furthermore, under such a course the commission would proceed in a conservative way, having due regard to the pressing needs of shippers upon the one hand, and fair consideration of the rights of transportation companies upon the other. It is to be remembered that any rates established by any commission cannot be maintained unless they are reasonably remunerative to the railway companies. To the end, therefore, that its work shall have a substantial value to the state, it is necessary that the commission proceed with that caution which will insure the maintenance by the courts of every rate established, should the action of the commission with respect to such rates be appealed by the corporations.

Action only on Complaint destroys Efficacy of Law

While it should be made the duty of the commission to investigate all complaints, I am strongly of the opinion that their action should not be made to depend upon the filing of such complaint. With the best protection which the commission can afford to shippers, when such commission

is fully clothed with authority to regulate the transportation service, it would be long before a shipper would feel warranted in subjecting himself to the annoyances that he might suffer because of his action in making complaint against a railway company with which he is obliged to transact business. Besides, with the burdensome rate conditions which are shown to prevail in Wisconsin, it would be manifestly unjust to require the public to await the action of the commission upon individual complaints. Such a course would amount practically to a denial of all the benefits of this legislation to small shippers whose freight rates are relatively much more burdensome to them than are the larger freight bills to those more extensively engaged in shipping. The amounts involved in the case of small shippers would be too small to warrant the expense incident to making a formal complaint and appearance before the commission in order to secure redress.

But this is not all. The great body of the people of Wisconsin who bear in the aggregate the principal burden of the freight rates, surely, could not appear before the commission to make complaint. Neither could they state their complaint or allege the measure of wrong imposed upon them by the transportation companies. They have no dealing directly with the railroads, and do not pay freights to the railway companies at all. They are, nevertheless, the ones who finally pay the largest proportion of all the transportation charges which go to swell the enormous revenues of the railway companies in Wisconsin. This they pay as a part of the price when they purchase the coal, the lumber, and merchandise which they must buy. True, the coal dealer and the lumber dealer and the merchant pay the freight in the first instance to the railroad, but they in turn charge the freight to the customers to whom they sell the coal, the lumber, the dry goods, the provisions, and other supplies. How shall the consumer obtain any relief against exorbitant transportation charges if the Railway Commission can only act upon the complaint of the individual, who, in reality, does not bear the final burden?

It must, therefore, be at once apparent that limiting the action of the commission to such cases only as are made the subject for formal complaint, would go far to curtail the value of the law, and I would recommend that the commission be authorized to investigate upon its own motion, with respect to any matter or anything concerning the efficiency of the service, the reasonableness of the rate, and the impartiality of the service as between different individuals and different places.

It is, of course, the province of the legislature to determine as to the various provisions and details of the bill; but I deem it both a privilege and a duty to make such suggestions as study and reflection upon this subject lead me to believe would in any manner aid in the preparation and enactment of legislation upon this very important subject.

The commission should have authority to require the railway companies, upon reasonable notice, to furnish all the cars requisite to

accommodate shippers. Many people engaged in various lines of business in Wisconsin experience great hardship because they have no appeal except to the railroads, whose convenience they have to await in the matter of supplying cars. This is often a serious loss to the shipper, particularly upon certain perishable classes of shipments, and in all cases it embarrasses the shipper's business with respect to markets and prices.

The railroads usually provide scales at terminal and division points only, so that the matter of weights is entirely within their own hands; as a result shippers are continually driven to make claims for overcharges in weight. There are to-day large numbers of shippers on every line in Wisconsin who have claims of this nature pending with the railway companies, to the amount of many thousands of dollars. These claims drag along, and require the most persistent effort on the part of shippers, in order to make even a partial recovery. The commission should be placed in a position to require all reasonable facilities for ascertaining and recording the weight of loaded cars, insuring ample protection to the interests of all shippers. They should also make reasonable rules and regulations for the prompt adjustment of all claims.

The commission should be authorized to require reasonably adequate train service on all lines, designating, wherever the action of the railway company makes it necessary, the minimum number of trains that shall run at convenient hours for the traveling public to reach centers of trade and reasonable connection with the service of other lines; to provide proper station accommodations and telegraph service; to require the use of automatic couplers, air brakes, and other devices for the protection of employees, with penalties for nonuse of the same; to make and enforce reasonable regulations respecting the protection of private property, and the proper drainage of lands affected by the construction of roads; and also to make regulations respecting crossings, interlocking switches, and other details of railroad equipment and operation.

Publicity

Secrecy is the source of many of the most serious evils pertaining to railway management. If the commission is clothed with power to enforce entire publicity, it will rarely be necessary to employ its authority to prosecute. Publicity should extend to complete itemized statements of all matters connected with the financial accounts of the railway companies' business. The maintenance of a particular rate, established by the commission, must depend upon the commission's knowledge of earnings and the expenses of the road. A percentage of railway profits is invariably concealed by the accounting system employed in all railroad offices. It follows that the authority of the commission over railway accounts should also extend to the enforcement of uniformity in keeping the same. The

importance of this matter has been repeatedly urged upon the attention of Congress by the Interstate Commerce Commission and through the action of the annual conventions of State Railway commissions.

Publicity should extend to all matters which may affect the public in any way, and the railway companies should be required to file with the commission copies of all contracts affecting public interests, made by railroads with each other, with shippers and passengers, with car and equipment companies, with express and other transportation companies, with land companies, and with every company doing business or shipping goods into or from this state, or in any way affecting said shipments.

The commission should likewise be authorized to require a list of all reduced passenger rates, passes, or mileage books issued free or for any consideration other than the full value of the same in money, which are, or may be used within the state, whether to employees or others, together with the names of the recipients and the reasons for issuing such reduced rates, passes, or mileage books. The commission should be empowered to require the usual traffic statistics, and full and accurate statistics of wages and of hours of continuous service of employees, including those of sleeping-car and express companies, telegraph operators, and all other persons employed by the railway companies, or by companies engaged in transportation in connection therewith.

Provision should likewise be made for the publication of reports by the commissioners embracing all of the foregoing information for the benefit of the general public.

Protection against Overcapitalization

The wrongs which may be inflicted upon the public through overcapitalization are so obvious that it seems scarcely necessary to discuss the importance of incorporating in this law a strong provision making it the duty of the commission to ascertain the value of all steam and electric railways within the state, and making it unlawful for any steam or electric railway company located in Wisconsin to issue any bonds or other evidences of debt, or to issue stocks and shares, or to execute leases and mortgages, without first obtaining an order from the commission authorizing such action. Could this have been done earlier in the history of railway building in Wisconsin, the people would not now be taxed so heavily on all transportation in order to pay interest and dividends upon an overcapitalization of all our roads. It is certainly wise to provide, with all possible speed, against any further overcapitalization of either steam or electric railroads already within the state, or any overcapitalization of such other lines as may from time to time be constructed. The history of railroad lawmaking affords but few examples of more vicious legislation than Chapter 198 of the laws of Wisconsin of 1899, by the provisions

of which any corporation in the state can purchase the property and rights of another by mortgage, bankruptcy, or judicial sale, can reorganize the purchased corporation, and put in its property at any price, or as representing any number of shares it may see fit, without reference to the value of the property or its cost, thus affording a great opportunity and inducement for a profitable and iniquitous business in stock watering. Provided that it shall not be a competing or parallel railroad, and that it shall intersect with some line of the purchasing railroad, or such as it is authorized to build, the law authorizes any railroad organized under the laws of this state to issue the capital stock and bonds of its own company for any amount it may see fit, without reference to the purchase price or the value, thus giving an unlimited power to water stock and inflate capital, based upon nothing of a substantial character or value.

Commission vested with Authority to make Commodity Rate

Large shippers in Wisconsin have heretofore professed to entertain great fear that such legislation as is here proposed would interfere with rates upon commodities important in their industrial enterprises. There is not the slightest ground for such apprehension on their part. Nothing can come within the scope of legislation which the state has the power to pass, except as it pertains to state commerce. That portion of the business conducted by large shippers in moving their products to distant markets constitutes interstate commerce. With such shipments, or with those from other states by rail into this state, a state commission cannot interfere. A state commission would be able to control rates with respect to such of these commodities or shipments as are made within the state. Upon principle and authority such commission can secure for a manufacturer as a right, not as a favor, from the railroad, as low a commodity rate as the railroad can make of its own motion. The commission should be vested with authority not only to make commodity rates, but to vary the rate as the requirements of any situation demand, assigning upon their records their reasons for any special exception made. The commission would then be able to furnish every possible aid and support for the maintenance and further development of such industries. The state can lawfully authorize a commission to make rates as low as it is possible for the railway company to furnish them to shippers. If a railway company is extending any rate as a commodity rate to any manufacturing enterprise in Wisconsin to-day, it would scarcely be able to interpose an objection to such rate when it was fixed by authority of a state commission; moreover, whenever it was established, or was evident that any such commodity rate could reasonably be made lower, a state commission should at once lower the same.

Railroad Rate-Making

A plausible objection which is always urged by the railroads against any "interference" with their making rates is, that rate-making involves a technical knowledge only possessed by those engaged in the transportation business. I am free to admit that rate-making requires technical and expert knowledge. It must be based upon definite and detailed information with respect to the value of railroad property, its cost of maintenance and operation, and the expense attendant upon handling and transporting the different classes and commodities of freight.

The railroads secure the services of men competent to discharge these duties. The state may likewise secure the services of men equally competent. In view of the great public interest, which goes vastly beyond the amount of money paid to the railroad companies annually for transportation, great as that sum is in the aggregate, it is less important than the administration of justice in securing an impartial service for all sections of the state, all lines of business, and each individual.

It is not possible to overstate the importance of the provisions of this law; but, however perfect the law, the state will fail utterly in its undertaking unless the commission is composed of men of high character and ability. Party preference or prejudices should, in no way, influence the selection of members of this commission. They should be men of the highest integrity, of marked industry, and they should possess special fitness and power for the important service demanded of them.

There is no other official in state government who will have such enormous interests with which to deal as will the members of this commission; nowhere else will the pressure for special favor be so great; and nowhere else will the effort to control the election of the officials, and thereby to control their official action, be so persistent and resourceful. Railway commissions in some states have fallen under the influence of the very railroads they were intended to regulate, and in some cases have only served to fasten more securely on the state the power of these corporations. The "regulated have become the regulators." This may always be traced to that falling-off of public interest following the strenuous efforts required to secure the enactment of such a law. The railroads count upon this, and whenever public attention relaxes with respect to these important officials, the corporations, ever on the alert, are ingenuous in having new issues brought forward to obscure and confuse public attention, and by means of their manipulation and unlimited resources they succeed in getting men of their own choice upon the commission. This is no reason for abandoning the effort to abolish existing railway discriminations and abuses, but it is a reason for giving most serious consideration to the method of selecting the members of the commission. Weakness at this point will, in the end, be disastrous, for

it will be at this point that the opposition will concentrate and direct its well-trained forces of attack.

It must always be borne in mind that the contest between the state and corporate power is a lasting one. Under a republican form of government the people must struggle to secure legislation, guard it jealously when secured, and be ever vigilant in the selection of their representatives for the administration of the law. It may be safely assumed that the railway corporations will continue their opposition to this legislation. Any effort to limit their control of commerce will be resisted in this state as it has been resisted in other states and in the national Congress. The history of every struggle to place upon the statute books like legislation has been the same. So long as it can be defeated they employ all of their power to that end. When the public interest becomes so awakened and it is clearly manifest that such legislation will be enacted, they then put forth all of their skill to incorporate provisions in the statute which will weaken or destroy its efficiency. For ten years, session after session, railway corporations prevented the adoption of the Interstate Commerce Law in Congress. When in 1887 they saw it must pass, they were ready with devices to cripple it in operation, render weak and ambiguous its terms, by preparing the way long in advance for court decisions divesting the commission of all control over interstate transportation. With respect to this, as well as to all other measures in which the railway corporations are in any manner interested, they have a right to be heard by counsel and to have their arguments and objections carefully considered. But it must always be remembered that their attitude throughout is one of hostility to this legislation, and that if their relation to the law after it is enacted is to be judged by their attitude toward the Interstate Commerce Law, it will be one of continued effort to destroy its efficiency and nullify its provisions.

Whatever differences of opinion may be found among supporters of a measure to regulate railway services and rates, as to whether the commission should be elective or appointive, you will, I apprehend, find no division among the opponents of such legislation. One and all they are quite certain to be unitedly in favor of an elective commission. While they will oppose the creation of any commission whatever so long as such opposition can be successfully made, and while they will oppose every provision to strengthen the hands of such commission, they will join with great unanimity for the election of the commission and in favor of the shortest possible tenure of office. I have no doubt that with the general public interest in this question which prevails at this time in Wisconsin, there would be little difficulty in securing in any general election, where there would be a full expression of the will of the people, a commission favorable to a thoroughgoing administration of the law, and I sincerely believe that a commission so chosen, if continued in office, would ultimately become well equipped to discharge its duties. But the

test of the elective system of choosing commissions comes later, more especially if such commission is fairly efficient in the discharge of the duties devolving upon it.

It is after rates have been in a measure satisfactorily adjusted, and the people in a measure satisfied, that their watchfulness abates. Their grievances are no longer so acute, their interests may be diverted to other questions of public concern, and, taken off guard by the tireless and vigilant allies of the railroads, they awaken finally to a realization that the personnel of the commission has been changed, that rates have ceased to tend downward, as they steadily should, with the increase of the tonnage and the improvement of the service, and that, on the contrary, rates have begun to advance and the old abuses again to assert themselves.

In the contest which would follow to restore again the commission to its original character and efficiency, difficulties would be encountered which are always possible in choosing between a large number of candidates where each attracts some following on personal consideration, independent of his qualifications, technical knowledge, and special merit. The ability of corporate wealth and power to control in the selection of a commission could scarcely be doubted under the caucus and convention systems. The adoption of such a primary law as we now have in Wisconsin would greatly strengthen the confidence of the people successfully to meet the corporations in such a contest.

The encroachment of the great railway systems, allied with industrial trusts and combinations, upon democracy, is a constant menace to whatever degree we may perfect the laws providing for the machinery of popular government. Every additional temptation for these great organizations as a system to take part in the elections, should be removed. Surely it is the part of wisdom to add none unnecessarily.

Upon this point I beg to invite your attention to the views of Professor Frank H. Dixon, head of department of economics, Dartmouth College, in his able work on "State Railroad Control," based upon a critical study of the history and operation of the Iowa law adopted in 1888:

> This law making commissioners elective was passed in the spring of 1888. Before that time the commissioners had been appointed by the governor, and their selection had depended in no degree upon their political affiliations. The opponents of the new order predicted that the change would furnish the railroads the opportunity which they sought of going into politics, and so it unfortunately proved. It has resulted in more than one campaign being fought out by the railroad and antirailroad forces, regardless of the connection of the candidates with one or the other of the great national parties. The commissioner who, by his public acts, seemed to favor the Granger sentiment as opposed to the railroads would be obliged, if a candidate for reëlection, to face the combined forces of the opposition, ably directed from railroad headquarters. At one election handbills and telegrams were sent out along the

lines of roads directing employees to vote for a certain man who was believed to be friendly to railroad interests. The grain men and large shippers were notified to join the movement. The opposition was strengthened through the multiplication of railroad employees' clubs, formed for no other purpose than to influence railroad legislation.

Experience has proven conclusively that the election of commissioners by popular vote is dangerous in furnishing inducement for the powerful corporations to make themselves felt politically. An appointment of commissioners by the governor, with the consent of the senate, or the executive council, which was the method in vogue at first, should be restored. When this has been done, a great step will have been taken toward promoting a feeling of harmony between shippers and carriers, — a spirit indispensable to the satisfactory solution of the railroad question.

There is another phase of this branch of the subject which is worth your careful consideration. The thought must ever be kept in mind, in a law creating a railroad commission with power to regulate services and rates, that the most important problem to be dealt with is the character and ability of the men who will be intrusted with this great responsibility. The work of the commission in fixing rates will stand or fall as it meets the severe tests applied in a review of its proceedings by the courts.

Rates established, either upon the initiative of the commission or upon complaints filed with it, cannot be sustained by the courts except such rates are fair not only to the public, but just and reasonable to the railroads as well. To determine this latter question requires a technical and expert knowledge of traffic conditions and of the cost of railway construction, maintenance, and transportation, in detail. In order that any rate established may be sustained, the commission must be able to meet and answer the ablest traffic experts in the employ of the great railway companies. They should be able to meet them, in so far as possible, upon equal terms. Railway traffic managers are, because of their ability and fitness, among the highest paid of all the railway company officials. A contest between political parties, where partisan feeling runs high and personal friendships and popular elements in character count in the determination of the result, does not afford the best conditions for judging of those purely technical qualifications and of that mental endowment and experience which specially fits for work of the character required of such a commission.

On the other hand, if the office is made appointive, there will be every opportunity for the appointing power to make selection from the widest possible field, having ample time for investigation of the candidate with respect to his antecedents, to the elements in his character, and to his ability, experience, and expert knowledge. The selection would be made full in the eye of the public, the appointing power having responsibility for his acts and knowing with a certainty that such appointment would not be confirmed unless it met the approving

judgment of the legislature. For I believe that these positions upon the commission are so profoundly important that if appointive, an additional check might well be provided to those usually made, and I would recommend that such appointment be subject to confirmation, not only by the Senate but by the Assembly as well, requiring the concurrent action of both branches of the legislature to confirm the same.

STATE CONSERVATION OF NATURAL RESOURCES[1]

Justice Holmes delivered the opinion of the court.

This is an information alleging that the defendant (the plaintiff in error), under a contract with the city of Bayonne in New Jersey, has laid mains in that city for the purpose of carrying water to Staten Island in the state of New York. By other contracts it is to get the water from the Passaic River at Little Falls, where the East Jersey Water Company has a large plant by which the water is withdrawn. On May 11, 1905, the state of New Jersey, reciting the need of preserving the fresh water of the state for the health and prosperity of the citizens, enacted that, "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh-water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein." By a second section a proceeding like the present was authorized in order to enforce the act. (Laws of 1905, Chapter 238, p. 461.) After the passage of this statute the defendant made a contract with the city of New York to furnish a supply of water adequate for the borough of Richmond, and of not less than three million gallons a day. Thereupon this information was brought, praying that, pursuant to the above act and otherwise, the defendant might be enjoined from carrying the waters of the Passaic River out of the state. There are allegations as to the amount of water and the probable future demand upon which the parties are not wholly agreed, but the essential facts are not denied. The defendant sets up that the statute, if applicable to it, is contrary to the Constitution of the United States, that it impairs the obligation of contracts, takes property without due process of law, interferes with commerce between New Jersey and New York, denies the privileges of citizens of New Jersey to citizens of other states, and denies to them the equal protection of the laws. An injunction was issued by the chancellor (70 N. J. Eq. 525), the decree was affirmed by the court of errors and appeals (70 N. J. Eq. 695), and the case then was brought here.

The courts below assumed or decided, and we shall assume, that the defendant represents the rights of a riparian proprietor, and, on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the court of errors and appeals

[1] From Hudson County Water Company *vs.* McCarter, Attorney-General of the state of New Jersey, 209 U. S. 349. Decided April 6, 1908. Opinion of Justice Holmes.

pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the state. It reënforced the state's rights by the state's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the state was warranted in prohibiting the acquisition of the title to water on a larger scale.

We will not say that the considerations that we have stated do not warrant the conclusion reached; and we shall not attempt to revise the opinion of the local court upon the local law, if, for the purpose of decision, we accept the argument of the plaintiff in error that it is open to revision when constitutional rights are set up. Neither shall we consider whether such a statute as the one before us might not be upheld, even if the lower riparian proprietors collectively were the absolute owners of the stream, on the ground that it authorized a suit by the state in their interest where it does not appear that they all have released their rights (see Kansas *vs.* Colorado, 185 U. S. 125, 142). But we prefer to put the authority which cannot be denied to the state upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the state may be said to possess.

All rights tend to declare themselves absolute to their logical extreme. Yet all, in fact, are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water, and

the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned (Kansas *vs.* Colorado, 185 U. S. 125, 141, 142; S. C., 206 U. S. 46, 99; Georgia *vs.* Tennessee Copper Company, 206 U. S. 230, 238). What it may protect by suit in this court from interference in the name of property outside of the state's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the state may make laws for the preservation of game, which seems a stronger case (Geer *vs.* Connecticut, 161 U. S. 519, 534).

The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use, or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an æsthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.

The defense under the fourteenth amendment is disposed of by what we have said. That under Article I, Section 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction cannot remove them from the power of the state by making a contract

about them. The contract will carry with it the infirmity of the subject matter (Knoxville Water Company *vs.* Knoxville, 189 U. S. 434, 438; Manigault *vs.* Springs, 199 U. S. 473, 480). But the contract the execution of which is sought to be prevented here was illegal when it was made.

The other defenses also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the states; neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by Geer *vs.* Connecticut, 161 U. S. 519, and the same decision disposes of the argument that the New Jersey law denies equal privileges to the citizens of New York. It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law (see Asbell *vs.* Kansas, ante, p. 251). The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the state within which the river flows, even if they are made to coincide with the state line. Within the boundary citizens of New York are as free to purchase as citizens of New Jersey. But this question does not concern the defendant, which is a New Jersey corporation. There is nothing else that needs mention. We are of opinion that the decision of the court of errors and appeals was right. [*Decree affirmed*]

Mr. Justice McKenna dissents.

NATURAL RESOURCES AS STATE PROPERTY[1]

State of Maine

In Senate, March 27, 1907

Ordered: The justices of the supreme judicial court are hereby requested to give to the Senate, according to the provisions of the constitution in this behalf, their opinion on the following questions, to wit:

In order to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving, and maintaining the natural water supply of the springs, streams, ponds, and lakes, and of the land, and by preventing or diminishing injurious erosion of the land and the filling up of the rivers, ponds, and lakes, and as an efficient means necessary to this end, has the legislature power under the constitution:

1. By public general law to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land, by the owner thereof, without compensation therefor to such owner;

[1] Questions submitted by the Senate of the state of Maine to the justices of the supreme judicial court of Maine, March 27, 1907, with the answers of the justices thereon (103 Maine, 506).

2. To prohibit, restrict, or regulate the wanton, wasteful, or unnecessary cutting or destruction of small trees growing on any wild or uncultivated land, by the owner thereof, without compensation therefor to such owner, in case such small trees are of equal or greater actual value standing and remaining for their future growth than for immediate cutting, and such trees are not intended or sought to be cut for the purpose of clearing and improving such land for use or occupation in agriculture, mining, quarrying, manufacturing, or business, or for pleasure purposes, or for a building site; or

3. In such manner to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated lands, by the owners thereof, as to preserve or enhance the value of such lands and trees thereon and protect and promote the interests of such owners and the common welfare of the people?

4. Is such regulation of the control, management, or use of private property a taking thereof for public uses for which compensation must be made?

In Senate Chamber, March 27, 1907.

Read and passed.

F. G. FARRINGTON, *Secretary*

To the Senate of Maine:

The undersigned justices, in obedience to the requirement of the constitution, severally give the following as their advisory opinion upon the questions of law submitted to the justices of the supreme judicial court by the Senate order of March 27, 1907.

We find that the legislature has, by the constitution, "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution nor that of the United States" (Const. of Maine, Article IV, Part III, Section 1). It is for the legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the defense and benefit of the people; and however inconvenienced, restricted, or even damaged particular persons and corporations may be, such general laws and regulations are to be held valid unless there can be pointed out some provision in the state or United States Constitution which clearly prohibits them. These we understand to be universally accepted principles of constitutional law.

As to the proposed laws and regulations named in the Senate order, the only provision of the United States Constitution having any possible application to such legislation by a state would seem to be that in the fourteenth amendment. As to that provision, we think it sufficient to quote the language of the United States Supreme Court in Barbier *vs.* Connolly, 113 U. S. 27, where, speaking of the fourteenth amendment, the court said:

But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of a state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education, and good order of its people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

It may be added that the proposed laws and regulations would not discriminate between persons or corporations, but only between things and situations, with a classification not merely arbitrary but based on real differences in the nature, situation, and condition of things.

We think the only provisions in the state constitution that could be reasonably invoked against the proposed laws and regulations are the guaranteed right of "acquiring, possessing, and defending property," and the provision that, "Private property shall not be taken for public uses without just compensation" (Dec. of Rights, Sections 1 and 21). If, however, the proposed legislation would not conflict with the latter provision, it evidently would not with the former; hence only the latter one need be considered.

The question of what constitutes a "taking" of private property in the constitutional sense of the term has been much considered and variously decided. In the earlier cases and in the older states the provision has been construed strictly. In some states, in later cases, it has been construed more widely, to include legislation formerly not considered within the provision. Still more recently, however, the tendency seems to be back to the principles enunciated in the earlier cases. In Massachusetts, one of the earliest states to adopt the constitutional provision, and in Maine, adopting the same provision in succession, the courts have uniformly considered that it was to be construed strictly as against the police power of the legislature.

Commonwealth *vs.* Tewksbury, 11 Met. 55, decided in 1846, was a case where the legislature prohibited the owners from removing "any stones, gravel, or sand" from their beaches in Chelsea as necessary for the protection of Boston harbor. The court held that the statute did not operate to "take" property within the meaning of the constitution, but was "a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with or injurious to the rights of the public." Commonwealth *vs.* Alger, 7 Cush. 53, decided in 1851, was a case where the defendant was prohibited by statute from erecting and maintaining a wharf on his own land (flats) beyond certain fixed lines. The court held that the defendant's title to the land (flats) was a fee simple, and that but for the statute he would have had full right to erect and maintain wharves upon any part of it where they would not obstruct navigation. It was not claimed that the proposed wharf would obstruct navigation, but rather admitted that it would not. The court further

held, however, that the statute was within the legislative power and not forbidden by any clause in the constitution. The question was considered at length in an opinion by Chief Justice Shaw, and the principle stated as follows, viz. (p. 84):

> We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tidewaters, is derived directly or indirectly from the government and held subject to those general regulations which are necessary for the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from right of eminent domain, etc.

In the case Wadleigh *vs.* Gilman, 12 Maine, 403, decided in 1835, only fifteen years after the adoption of our constitution, there was upon the plaintiff's land a wooden building. A city ordinance was passed by legislative authority prohibiting the erection of wooden buildings within certain limits, which included the plaintiff's building. After the passage of the ordinance the plaintiff moved his building to another place within the same inhibited limits. The defendant as city marshal, acting under the ordinance, entered upon the plaintiff's land and took the building down. The court held the ordinance valid and the defendant protected, and declared as follows (p. 405):

> Police regulations may forbid such a use and such modifications of private property as would prove injurious to the citizens generally. This is one of the benefits which men derive from associating in communities. It may sometimes occasion inconvenience to an individual, but he has compensation in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power without impairing any constitutional provision. It does not appropriate private property to public uses, but merely regulates its enjoyment.

In Cushman *vs.* Smith, 34 Maine, 247, decided fifteen years later, in an elaborate opinion by Chief Justice Shepley, the court said of the constitutional provision in question (p. 258):

> The design appears to have been simply to declare that private property shall not be changed to public property, nor transferred from the owners to others for public use without just compensation.

In Jordan *vs.* Woodward, 40 Maine, 317, it was said by the court at p. 324:

> Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well-defined rights to that use secured, as the right to use the public highway, the turnpike, the ferry, the railroad, and the like.

The same doctrine was recognized in Preston *vs.* Drew, 33 Maine, 558; State *vs.* Gurney, 37 Maine, 156; Boston & Maine R. R. Co. *vs.* County Commissioners, 79 Maine, 386; and, as late as 1905, in State *vs.* Robb, 100 Maine, 180.

There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land: first, such property is not the result of productive labor, but is derived solely from the state itself, the original owner; second, the amount of land being incapable of increase, if the owners of large tracts can waste them at will without state restriction, the state and its people may be helplessly impoverished and one great purpose of government defeated.

Regarding the question submitted in the light of the doctrine above stated (being that of Maine and Massachusetts at least), we do not think the proposed legislation would operate to "take" private property within the inhibition of the constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched, and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or "taken."

In the following cases restrictive statutes for the protection of property and other material interests of the people were held to be within the police power, and not a taking of private property, viz.: limiting the height of buildings though the owner owns *usque* and *coelum* (Welch *vs.* Swasey, 193 Mass. 364); prohibiting the erection of wooden buildings within specified limits (Wadleigh *vs.* Gilman, 12 Maine, 403), even when the owner had begun to erect the building before the statute was enacted (Salem *vs.* Maynes, 123 Mass. 372); authorizing the destruction of buildings without compensation to prevent the spread of a conflagration (Am. Print Works *vs.* Lawrence, 23 N. J. L. 9); prohibiting the further use of buildings and appliances for brewing purposes, although they had been erected and fitted for that purpose when brewing was a lawful business (Mugler *vs.* Kansas City, 123 U. S. 623); prohibiting the erection of fences on one's own land to gratify spite against others

(Karasek *vs.* Peier (Wash.), 50 L. R. A. 345; Smith *vs.* Morse, 148 Mass. 407); prohibiting the wasteful burning of natural gas by the owner (Townsend *vs.* State (Ind.), 37 L. R. A. 294); prohibiting the use of artificial means, by the owners of gas wells, to increase the natural flow of the gas from them (Manufacturer's Gas Co. *vs.* Indiana Natural Gas Co., 155 Ind. 467; 50 L. R. A. 768); authorizing dams for the purpose of reclaiming swamp lands where the effect was to oblige landowners to construct and maintain dikes to protect their lands from the water raised (Manigault *vs.* Springs, 199 U. S. 473); prohibiting one from allowing weeds to grow on his own land (St. Louis *vs.* Gault, 179 Mo. 8; 63 L. R. A. 778); limiting the quantity of land any person or family may cultivate within city limits (Summerville *vs.* Presley, 33 S. C. 56); prohibiting the flow of water from a private artesian well except for certain specified beneficial purposes, as irrigation or domestic use (Ex parte Elam (Cal.), 91 Pac. Rep. 811). In Windsor *vs.* State (Md.), 64 At. Rep. 288, a statute restricted owners of private oyster beds in taking oysters from them. It was held constitutional and not a taking of private property. The court, quoting from Judge Story, said: "Property of every kind is held subject to those regulations which are necessary for the common good and general welfare. And the legislature has the power to define the mode and manner in which one may use his property."

The foregoing considerations lead us to the opinion at present that the proposed legislation, for the purposes and with the limitations named in the Senate order, would be within the legislative power and would not operate as a taking of private property for which compensation must be made.

Respectfully submitted,

March 10, 1908

LUCILIUS A. EMERY
WM. P. WHITEHOUSE
SEWELL C. STROUT
HENRY C. PEABODY
ALBERT M. SPEAR
LESLIE C. CORNISH

Mr. Justice Woodard, one of the justices of the court when the Senate order was passed, died before the foregoing opinion could be prepared. His successor, Mr. Justice King, was not appointed for several months after the passage of the Senate order, and holds that, therefore, the Senate has not required any opinion from him.

LUCILIUS A. EMERY

Note. Mr. Justice Albert R. Savage declined to give an opinion upon the question submitted, for the reason that he considered it not a "solemn occasion" as required by Article VI, Section 3, of the constitution of Maine.

CONSERVATION OF NATURAL RESOURCES IN THE STATE OF NEW YORK[1]

By Governor Charles E. Hughes

The wise and patriotic summons of the President to the consideration of necessary steps for the conservation of our natural resources met with a cordial response from the people of the state of New York. The Empire State has been bountifully blessed by nature, and for a long period there has been a steady growth in the appreciation of her priceless treasures and of the importance of preserving them. Our vast stretches of forests, feeding our streams and nourishing the agricultural and industrial activities of our citizens, long remained the subject of selfish devastation in reckless disregard of the just demands of future generations, and without thought of the essential conditions of our continued prosperity. That sagacious statesman, De Witt Clinton, foresaw the results of careless waste of nature's bounty, and of the wanton sacrifice of our capital, thoughtlessly supposed to be inexhaustible, in the satisfaction of the demands of the moment. In addressing the legislature in 1822 he said:

> Our forests are falling rapidly before the progress of settlement, and a scarcity of wood for fuel, ship and house building, and other useful purposes, is already felt in the increasing prices of that indispensable article. No system of plantation for the production of trees, and no system of economy for their preservation, has been adopted, and probably none will be until severe privations are experienced.

From time to time public-spirited citizens and farseeing statesmen called attention to the need of a system of conservation, but it is only in a recent period that measures of protection were adopted. Not only did the state fail to acquire and hold from spoliation our forest tracts, but lands which had passed into the control of the state were recklessly disposed of at nominal prices, and are now, under a new policy, the subject of reacquisition at greatly increased cost. It may be of value briefly to review the experience of the state during the past twenty-five years. Governor Cleveland in 1884 thus addressed the legislature upon this subject, speaking of the practice which had prevailed:

> The Hudson, Mohawk, and Black rivers are to a very large extent fed by streams and lakes in the southern slopes of the Adirondack wilderness, and the Black River may well be regarded as the principal feeder of the Erie Canal. This statement renders the importance of protecting the water in the sources of the rivers named, from serious diminution, distinctly apparent. The fact that this can only be done by the preservation of the forests bordering on the sources of water supply needs no demonstration, and was recognized by the last legislature by the passage of an act prohibiting the further sale of our northern wilderness lands.

[1] From Proceedings of the Conference of Governors, 1908.

The immense volume of commerce which passes through the Erie Canal and the Hudson River to the seaboard, and the low stage of water during the summer in the last-named waterway as well as the other rivers and streams of the state, have attracted the attention of the public to the necessity of arresting the further destruction of our northern forests.

This is certainly a very important matter, and should receive early and serious attention. We find ourselves facing the danger which now so excites the people, because the interests of the state have not been cared for in the years that are past, and because our forest-laden lands have been recklessly disposed of at nominal prices, until, at this late day, we are awakened to the fact that the control which the state should have always maintained over that part of those lands which are important to the preservation of our streams has been to a large extent surrendered.

The plan has been, it seems, quite generally adopted by the grantees from the state to refuse to pay taxes assessed upon these lands after their purchase, and to permit them to be sold for such taxes, the owner taking advantage of the time between the levying of the taxes and the sale of the land to cut off and sell such timber as he finds to his profit. In default of other bidders at such tax sale, the state becomes the purchaser. Two years is allowed the delinquent owner after the sale to redeem his land.

Sales of these lands are customarily made by the comptroller once in about five years, and then they are sold for taxes that have remained due and unpaid for a period not less than five years prior to the sale; thus in 1881 forest lands were sold for taxes levied thereon between the years 1871 and 1876. It will be readily seen that this allows the grantees of these lands, who from the first day of their ownership deliberately refused payment of all taxes, from seven to twelve years within which to cut off and sell timber — thus realizing an immense return from the amount originally paid for the land.

At that time a system of better control of the forest lands was suggested, and the project of having the state purchase immense tracts of these lands was opposed as involving an extravagant expenditure. In 1885 the attention of the legislature was again directed to the subject by Governor Hill, who said:

The forestry problem has in late years became an important one, and through natural causes and through the operations of some industries in the northern counties of the state, it is becoming every year more important and pressing. It is claimed by those who have given the subject attention that the preservation of the forest growth, especially in those parts of the Adirondack region which are unfit for profitable tillage, is a matter of serious concern to the material prosperity of the entire state. Valuable water courses are largely dependent upon the preservation of the forest trees now standing and a restoration of a new growth to tracts which have been left waste; and this protection of rivers and streams is doubtless in this matter the chief consideration to the state at large. In addition, however, the northern counties are threatened at no distant day with a serious diminution, or even loss, not only of the profitable and rapidly growing industry of caring for the numerous persons who, from within and without the state, resort to their lakes and woods for health or pleasure, but also of the lumbering

industry itself. It seems probable also that the owners of forest lands ought to be afforded ample protection against trespassers who set fire to or cut or injure trees upon such owners' lands.

The matter was made the subject of investigation by commission. And it was in 1885 that a Forest Commission was established, and the lands then owned, or which might thereafter be acquired by the state within specified counties, were constituted a forest preserve. The state already had considerable holdings of forest lands, principally through tax defaults. It was further provided that lands composing the forest preserve should "forever be kept as wild forest lands," and should "not be sold or leased by any corporation, public or private." The Forest Commission, three in number, were given the care and control of the preserve and charged with the duty to protect the forests on the preserve and to promote their further growth.

In 1887 provision was made for the disposition of separated small parcels in the preserve, or the timber thereon, under important restrictions.

In 1890 Governor Hill brought to the attention of the legislature the advisability of a better definition of the limits within which lands were to be retained by the state for forest purposes, and of appropriate legislation with regard to the creation by the state of a forest park in the Adirondacks. In a special message he said:

The portion of northern New York know as the "Adirondacks" has become a great summer and winter resort for persons seeking pleasure or health, not only from our own state but from other sections of the Union. It is rapidly becoming a nation's pleasure ground and sanitarium.

The state now owns a large portion of this section, which has been placed under the control of a Forest Commission. The present statutes seem to contemplate retaining all the lands that come to the state from tax sales as part of a vast park, without reference to quality, quantity, or locality; and many parcels thus reserved are small and are not connected with the main body of state lands.

It seems to me that the limits within which lands are to be retained by the state for this purpose should be settled and defined, and should include the wilder portion of this region, covering the mountains and lakes at and around the headwaters of the several rivers that rise in that locality, including the Hudson River; and that all the lands outside of these limits should be subject to sale as other state lands are sold. If practicable, these lands could be exchanged for wild and forest lands within the limits prescribed.

Considerable complaint has been made that persons desiring to build summer camps or cottages upon lands belonging to the state have not been permitted to do so. I can see no reason why, under suitable restrictions, small parcels should not be leased at a moderate rental for such purposes. Such occupants would have an interest in preserving the forests in all their beauty, and would be the best of fire wardens and foresters, while the wilderness would thus afford a summer home to persons of moderate means, as well as to the wealthy.

The subject is worthy of the most careful consideration. It is represented to me by those who are familiar with the situation and needs of that section,

and in whose judgment I have confidence, that a state park, from fifty to seventy miles square, can be obtained by the state in that region at comparatively trifling expense, and that when obtained, if judiciously and sensibly managed, it will prove of inestimable value and benefit to the whole country.

A personal inspection on my part last summer of a portion of the Adirondack region confirms, in my judgment, the desirability of some appropriate legislation upon this subject.

It is believed to be the true policy of the state to encourage rather than retard visitation to this delightful region, and a broader and more enlightened policy than that which has heretofore been followed should be pursued. Several reasons are apparent why it is expedient that some independent commission should investigate this matter and originate a scheme for carrying out the suggestions herein outlined, rather than the Forest Commission, whose powers are already limited by statute and whose duties are confined to a mere preservation of the forests.

I think the Adirondack forests, instead of being an expense and burden to the state, are capable, under the liberal policy here suggested, of paying all the expenses of their preservation, as well as of yielding a handsome revenue to the state.

The action taken by the legislature upon this recommendation was to authorize the Forest Commission to purchase lands, located within such counties as included the forest preserve, as should be available for the purpose of a state park, at a price not to exceed $1.50 per acre; but the act appropriated only $25,000 for the purpose.

In 1892 another act was passed establishing a state park to be known as the Adirondack Park, which should be "forever reserved, maintained, and cared for as ground open for the free use of all the people for their health or pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state and a future timber supply." And the Forest Commission was authorized to purchase land in certain counties mentioned. They were, however, given power to sell any portion of the lands within specified counties the ownership of which, in their opinion, was not needed to promote the purposes in view. The theory was, apparently, that detached pieces could be sold, and that the proceeds would be sufficient to buy the desired amount within the park limits, and no adequate appropriation was made for independent acquisition on any suitable scale. This policy, however, was not a successful one, and, as Governor Flower in his annual message of 1893 said, "The results to-day, after nearly seven years' effort to establish an Adirondack Park, are disappointing." He pointed out that while the existing methods would answer "the temporary purpose of getting rid of lands useless for a forest preserve and acquiring other lands needed, so far as the proceeds of sales would permit, it would not do for a permanent and exclusive state policy." He added that if it was the desire of the people that the state should absolutely own two or three million acres of the forest preserve, the lands should be acquired at once by right of eminent domain, and the operation

should be comprehensive and decisive, which would "be vastly more economical in the long run than the present policy of purchase by driblets."

Governor Flower's specific recommendations (in connection with a reorganization of the Forest Commission) were (1) that forest tracts owned by individuals or private associations and used mainly for the purpose of recreation should be secured as a part of the forest preserve and guarded against denudation by a contract with the state providing for exemption from taxation in consideration of forest protection and restrictions on the removal of timber; and (2) that revenue should be secured to the state "by granting permission to fell trees above a certain diameter on state lands and to remove the timber."

Legislation embodying these recommendations was enacted in 1893 and the results were thus stated by Governor Flower in his next annual message:

These recommendations were promptly embodied in law, and the new Forest Commission is now able to report that 225,000 acres of Adirondack land have been offered to the state upon the terms of the proposed contract, and that standing spruce timber exceeding twelve inches in diameter has been sold on 17,468 acres of state land, from which it is expected that the first year's cutting will yield to the state a revenue of $52,400. These prompt results are exceedingly gratifying. It thus appears that the state forest preserve has been increased by probably a million dollars' worth of lands without any direct appropriation of public money, and that the first year of intelligent administration under the new law has insured to the state an annual revenue largely in excess of the entire cost of maintaining the Forestry Bureau. Every lover of the Adirondacks and every friend of forest preservation will rejoice at these results, but they will be particularly satisfactory to the taxpayers of the state. If from so small a portion of the forest preserve so considerable a revenue is received without injury to the forests, we can reasonably look forward to the time when the forest preserve will not only be the great conservator of our water courses and the restorer of health, but will contribute a large part of the money required for the support of the state government.

All sales of stumpage were to the highest bidder. Applications for sales were numerous and covered more timber than the Forest Commission thought wise to sell at that time. They indicate that there will be no difficulty in obtaining an annual revenue which shall not only render the department self-sustaining, but will leave a large balance, which for the immediate future can be applied annually on the purchase of land and the enlargement of the preserve.

The legislative policy, declared two years ago, of selling scattered and detached tracts of state forest land lying outside the limits of the Adirondack Park has been pursued during the year, but not many sales have been made, owing to the depression in financial circles.

In 1894 a constitutional convention was held, and the desire of the people to safeguard the forests and to place their preservation beyond the reach of any form of attack was emphatically expressed. Public opinion assumed definite and authoritative statement in the amendment to the constitution which was recommended by the convention and adopted

by the people. They did not propose that any devastation of the state lands should be permitted under any pretext, and they put into the constitution the emphatic words of the statute of 1885, which as a mere legislative enactment had been subject to legislative alteration. The amendment was as follows (Article VII, Section 7):

> The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed.

The policy of forest preservation was thus imbedded in the fundamental law.

The special committee on State Forest Preservation of the Constitutional Convention reported that they were of the opinion that "for the perfect protection and preservation of the state lands, other lands contiguous thereto should, as soon as possible, be purchased or otherwise acquired," but they felt that any action to that end was more properly within the province of the legislature than of the convention. Governor Morton in his annual message of 1896 described the constitutional policy as one which was "giving satisfaction to the people," and pointed out that "unless these lands are acquired within a reasonable time, they can only be obtained at higher cost many years hence." Adequate appropriations for extensive purchases, however, were not made until 1897. Governor Black in his annual message of that year thus stated the situation:

> Private individuals have taken advantage of the state's neglect, until of the entire Adirondack region, consisting of more than three and a half million acres, the state owns eight hundred and forty-one thousand, less than a quarter; and of the proposed Adirondack Park of two million eight hundred thousand acres, it owns even a smaller percentage, about six hundred and sixty-one thousand acres. Of this proposed park more than eight hundred and eighty thousand acres are held as private preserves and more than a million and a quarter acres by lumbermen and others, so that of the proposed total area of two million eight hundred thousand acres more than two millions are owned by private individuals. More than a million and a quarter of the two millions so owned are now subject to fire and ax, and the devastation wrought yearly is appalling and disgraceful. More than four hundred and fifty million feet of wood and timber are cut, and more than one hundred thousand acres stripped, every year. This work of devastation is progressing fast. The banks of the lakes and rivers and all sections accessible from either are ravaged at such a pace that but few years more can elapse before that region, in many respects the most wonderful and valuable in the world, will be practically destroyed. The parts acquired or claimed by individuals are the best. A traveler through any desirable portion of that country is sure to be met with the charge of trespassing, for the cases are rare in which the title of the state to a desirable tract is acknowledged. Some time this deplorable condition must be rectified. Every year the loss to the state grows larger, in all cases difficult, and in some cases impossible of recovery. The land is steadily

and rapidly increasing in value. The bogus title burrows further out of sight the longer it is let alone. Witnesses die, and the only thing sure to increase is the encroachment of individuals upon the domain of the state. The enlargement of the canals will require more water and the demand in every direction is increasing, while the supply is steadily falling off. A subject of such magnitude should not be postponed nor conducted with the halting method which is too apt to distinguish public enterprises in which large appropriations afford convenient resting places in which officeholders may grow old. Not long ago the state appropriated $1,000,000 to preserve the beauties of Niagara Falls. That subject is without significance compared to the Adirondack forests. Every consideration of health, pleasure, economy, and safety urge the speedy consideration of this subject, and such consideration should include appropriations adequate to ascertain the nature of the titles adverse to the state, and to recover where the titles are insufficient and to purchase where they are valid. Any other course would be false and unwise economy.

Thereupon the legislature appropriated $1,000,000 for the acquisition of forest lands, and created the Forest Preserve Board, with authority to purchase tracts within the Adirondack Park. With this appropriation the board acquired over two hundred and fifty thousand acres at an average cost of $3.74 per acre. In 1898 another appropriation was made of $500,000, and in the years 1899 and 1900, under the administration of Governor Roosevelt, $600,000 was appropriated for these purposes. No further appropriations were made until 1904, when there was an addition of $250,000. In 1906 $400,000 more was appropriated, and this was followed by an appropriation in 1907 of $500,000. With these moneys the forest holdings of the state have largely been increased. Provision has also been made for the acquisition of forest lands in the Catskill Mountains, and the Catskill Park has been delimited, and purchases have been made in this region with a portion of the moneys above mentioned.

The area of the proposed Adirondack Park is 3,313,564 acres, and that of the proposed Catskill Park 576,120 acres, making a total of 3,889,684 acres. The land within this Adirondack Park now owned by the state amounts to 1,363,890 acres, and within the Catskill Park the state owns 100,920 acres, making a total of 1,464,810 acres. The lands which are still held in private ownership within these parks thus amount to 2,424,874 acres. The total area of the present state forest preserve, including the lands acquired within the two parks, amounts to 1,593,789 acres. Purchases are made from time to time where they can be effected on advantageous terms. The powers formerly possessed by the Forest Preserve Board are now vested in the Forest, Fish, and Game Commissioner, and purchases are made by this commissioner and two commissioners of the Land Office (who are elected state officers) acting under designation by the governor. At present the purchasing board is composed of the Forest, Fish, and Game Commissioner, the state comptroller, and the Speaker of the assembly.

The provision of the constitution prohibiting the removal of timber from state lands in the forest preserve has been the subject of criticism because of the prevention of scientific forestry. The policy which makes it necessary for trees to be left to fall and decay and makes no provision for taking proper advantage of nature's laws of growth, maturity, and renewal, cannot be regarded as permanent. Under careful superintendence the forests may give their natural yield for the benefit of the people without prejudicing their preservation, and indeed to their benefit. This was emphasized by Governor Black. But the experience of the past has taught the people to be cautious in examining proposals for cutting timber. They fear that if the opportunity were offered for the removal of timber under any pretext, the strain upon state administration would be too strong, and that avarice, looking only for immediate gains, would cause the most serious, if not irreparable, losses. They have watched the destruction of the forests too long to be easily satisfied with promises. They have not been ready to take chances of further devastation of the forests, and they will not be disposed to make changes in the constitutional provision which protects them until the rules of conservative cutting, based upon proper regard for forest protection, are so well established and observed in the exercise of private rights as to remove any menace to the public interest in case the state should be empowered to harvest its forest crop.

As Governor Roosevelt said in his annual message of 1900:

> A primeval forest is a great sponge which absorbs and distills the rainwater, and when it is destroyed the result is apt to be an alternation of flood and drought. Forest fires ultimately make the land a desert, and are a detriment to all that portion of the state tributary to the streams through the woods where they occur. Every effort should be made to minimize their destructive influence. We need to have our system of forestry gradually developed and conducted along scientific principles. When this has been done it will be possible to allow marketable lumber to be cut everywhere without damage to the forests, — indeed, with positive advantage to them; but until lumbering is thus conducted, on strictly scientific principles no less than upon principles of the strictest honesty toward the state, we cannot afford to suffer it at all in the state forests.

The importance of forestry was also emphasized by Governor Odell and by Governor Higgins. We may therefore look forward to a time when improved methods of caring for the forests will be adopted, and when, with advantage to the state's interests, we shall secure their proper yield. The absolute restriction of the constitutional amendment makes, however, an emphatic protest of the people against any selfish designs upon these resources of the state, and nothing will be tolerated which will in any degree open our forest preserve to greedy spoliations.

The state not only has sought to protect its forests by purchases and by agreements with owners of forest tracts, but it has also begun the

work of reforestation. While this has so far been prosecuted on a relatively small scale, gratifying progress has been made. We have several nurseries, and this year 1,100,000 pine and spruce trees have been set out. This work can be conducted with comparatively small outlay and in a constantly increasing measure. Appropriation was also made at the last session of the legislature to establish additional nurseries for the propagation of forest trees to be furnished to citizens of the state at cost, and to be planted under the direction of the Forest, Fish, and Game Commissioner.

There has also been a heightened appreciation of the importance of preserving and caring for our natural wonders and places of rare beauty and grandeur, which are of inestimable value for the enjoyment and the inspiration of the people. In 1883 provision was made for the appropriation of lands at Niagara Falls, and a state reservation was constituted. The legislature has declared that it "shall forever be reserved by the state for the purpose of restoring the scenery of Niagara Falls and preserving it in its natural condition, and kept open and free of access to all mankind without fee, charge, or expense to any person for entering upon or passing to or over any part thereof." A beautiful park adjoining the Falls has thus been provided, depredations have been prevented, unsightly structures have been removed, excellent roads have been laid out, guard rails and bridges have been built, and in all the work of improvement unnecessary artificialities have been excluded. Natural slopes have replaced artificial banks, trees have been planted, and barren spots have been beautified by suitable growths. Thus the visitor to Niagara's sublime spectacle may view the Falls from a borderland, under the protection of the state, where accessibility and convenience have been provided without sacrifice of beauty. Efforts to prevent improper diversion of power and the consequent impairment of the Falls culminated in the Burton Bill passed by Congress in 1906.

Through the influence of the late Hon. Andrew H. Green of New York, who had been prominent in the work of restoring natural conditions at Niagara Falls, the American Scenic and Historic Preservation Society was founded in 1895, an organization through which the public demand for the preservation of places of scenic and historic interest has found powerful and effective expression.

It was in 1895 that commissioners were appointed in New York to meet with similar commissioners of New Jersey for the purpose of devising means for establishing a reservation of the Palisades of the Hudson. In 1900 the Palisades Interstate Park was established under the care of the two states, represented by a joint commission. A large amount of shore frontage has been acquired, and in this way the devastation of the Palisades has, to an important degree, been prevented.

In 1906 the beautiful Watkins Glen was acquired as a state reservation. In 1907 the Bronx River Reserve was established, consisting of

lands on either side of the Bronx River in New York and Westchester counties, for the purpose of preserving the river from contamination and of creating a parkway for public use.

Last year also the state received a munificent gift from William Pryor Letchworth, a distinguished citizen of the state, who has rendered long and notable service in the cause of philanthropy. Mr. Letchworth has conveyed to the state, for the purposes of a public park, a tract of rare beauty lying in Wyoming and Livingston counties, of about one thousand acres in extent. Through this tract, now known as Letchworth Park, flows the Genesee River, with sublime scenery of canyon and waterfall. It is a territory of extraordinary variety of native growths, affording exceptional opportunities to the naturalist and a retreat of peculiar charm for the lover of nature. This benefaction fitly crowns a long life of devotion to the public welfare.

During the present year another addition has been made to the state reservations by provision for the retention and development as a public park of the property at Fire Island, on the Long Island coast, which was acquired some years ago for the purposes of temporary quarantine. In view of the growth of metropolitan population, the holding of this strip of seaboard for park purposes cannot fail to be of great public benefit.

A matter of extreme importance to the future prosperity of the state is the development and control of its water powers. With increased facilities in the transmission of electrical power, the subject compels attention, as the control of the water powers of the state will mean largely the domination of its industrial activities. From recent statistics it appears that of the entire horse power developed by water for manufacturing purposes in the United States, over one quarter is used in New York. And New York is fortunate in having within her borders so many sources of power, and in possessing extraordinary opportunities for further development. It is difficult to overestimate the great importance of this subject and the necessity of taking wise action at the present time in order that we may properly care for the interests of the future.

In my annual message to the legislature of 1907, after referring to the importance of the policy of acquiring forest lands, I said:

> In this connection it is well to consider the great value of the undeveloped water powers thus placed under state control. They should be preserved and held for the benefit of all the people, and should not be surrendered to private interests. It would be difficult to exaggerate the advantages which may ultimately accrue from these great resources of power if the common right is duly safeguarded.

After referring to the legislation which had created a Water Supply Commission, charged with duties with regard to potable waters and river improvement, I added:

> It remains to be considered whether it is not advisable to provide a more comprehensive plan, embracing in a clearly defined way the matter of water

storage and the use of water courses for purposes of power. The entire question of the relation of the state to its waters demands more careful attention than it has hitherto received, in order that there may be an adequate scheme of just regulation for the public benefit.

Pursuant to this recommendation, the legislature of 1907 directed the State Water Supply Commission "to collect information relating to the water powers of the state and devise plans for the development of such water powers," and appropriated $35,000 for the purpose. The act contemplated a thorough investigation and the submission of accurate information and comprehensive plans.

The commission entered zealously upon its work and procured competent expert assistance. In February last it made a valuable preliminary report in which the general phases of the subject were presented in a most interesting and instructive manner:

Excluding Niagara and St. Lawrence, the rivers of the state, with the proper storage of their flood waters, are capable of furnishing at least 1,000,000 horse power for industrial purposes. On account of the wide difference between the minimum and maximum flow of the streams, the minimum flow being the real test of the power value, at least 55 per cent of their potential energy is lost to the owners of water rights and to the people of the state. It is clear, therefore, that 550,000 horse power of energy is annually allowed to run to waste because no well-devised and comprehensive plan for the general and systematic development of water power has yet been undertaken by the state.

At a low estimate the advantage of water over steam power is at least $12 per horse power per year. The annual earning capacity of the wasted energy, based on even so low an estimate, is $6,600,000. Add to this the $1,000,000 per year of direct damage caused by floods, and the indirect damage which no one has yet been able to determine, but which is surely equal to the direct damage, and the value of an equalized flow during the summer months in the great rivers, which is not inconsiderable, and the possibilities to be derived from proper treatment of the Niagara and St. Lawrence, and the aggregate will give some idea of the value to be obtained by the systematic development and increase of the water powers of the state.

The rivers of the state are and have been open to inspection by every one. The locations of falls and power sites have long been known to individuals, and it has not been difficult to acquire them. Meantime the possibilities of power development have been steadily growing, and the advantages to be gained thereby have been constantly increasing. It is not strange, therefore, that farseeing men have purchased nearly all of the most desirable water power within the state, except such as may be situate along the boundary rivers.

Up to this time there has not been, and under present conditions there cannot be, such economical and general development of water power by private interests as will include the storing of flood water on a scale at all commensurate with the advantages to be gained thereby. It is from this method that the greater amount of increase is to come. Moreover, the individual or corporation that invests money usually does so in the hope of immediate gain — the larger the immediate profits the more enthusiastic the promoter. There is therefore the temptation to cut out of the work everything that can be

postponed or avoided, no matter how essential it may be to the future success of any well-considered plan. The storing of flood waters will provide not only power development at the site of the dam, but will also increase the power of every user down the stream. The fear of improving the plant and the power of a competitor might well restrain an owner of water power from going farther upstream and building a storage dam that would increase the value of his neighbor's plant as well as his own. It is also very difficult for several interests to combine in aid of such a project. Even though they should be willing to engage in a joint enterprise for such a purpose, there would be still the lack of power to condemn land for storage purposes for which recourse must be had to the lawmaking body.

The United States census of manufactures for 1905, Bulletin 88, shows that of the 1,647,969 horse power developed by water in the United States for manufacturing purposes, 446,134, or 27½ per cent, was used in the state of New York. This is more than twice as much as is used by its principal competitor, the state of Maine, and more than one half as much as the total steam power for like purpose used in the state. The increase in water power in this state from 1900 to 1905 was over 100,000 horse power. This rapid increase in so short a period is, without doubt, one of the causes which has attracted the attention of economists to the value for the state's own benefit of this branch of its natural resources.

By means of storage dams constructed by the state at available points, in order to hold back the flood waters of many of our large rivers, it is possible so to equalize their flow as to more than double the available horse power they now produce. Such improvement can be made to yield a revenue that will not only pay the cost of constructing and maintaining the dams, but that also will provide a large income for the state for all time.

The commission believes that through the building by the state of storage dams, thus conserving water for power purposes, five distinct advantages will accrue:

(*a*) The construction of such dams will decrease the annual damage by flood waters.

(*b*) It will assure a larger minimum flow, which will improve the sanitary conditions.

(*c*) It will provide a deeper channel for the Hudson, thus improving navigation and insuring an abundance of water for the increasing needs of the canal.

(*d*) It will provide cheaper power for manufacturing purposes, and by stimulating various industries furnish larger fields of employment, while insuring uninterrupted labor in already existing plants.

(*e*) It will provide a satisfactory annual income to the state.

Each of these points is in itself worthy of the careful investigation which the legislature has directed to be made.

Controllable power is the vital force in our industrial development, and one of the chief elements upon which civilization is based. Manufactories, transportation, and artificial light are largely dependent upon it. The more complex our civilization, the more intricate our manufacturing enterprises; and the more important rapid transit becomes, the greater our dependence upon this force. There are two sources of power available, — coal and falling water. Both require skill and money to turn their latent force into active energy. Coal once used is gone, but water, however often utilized, returns again. Coal is

growing less plentiful and more expensive, while water, by the processes of nature, keeps up its original force without additional cost.

It is universally conceded that the use of falling water for power purposes is much more economical than coal. As a competition becomes more acute the value of water power over steam becomes greater. Cheap power must continue to be a vitally interesting subject to those who manufacture goods, provide transportation, and furnish light. The discoveries which permit the carrying of electrical currents a long distance have largely increased the value of falling water for power purposes. Such power must of necessity continue to grow in value as new opportunities for its use appear, and as the price of fuel advances.

This is a plain statement of an almost elementary truth with which all who stop to consider our industrial conditions are familiar. This economic condition is attracting attention to the possibility of the greater use of falling water, and constitutes a summons to those in authority to provide a way to save the lost energy that is annually allowed to run to waste in our rivers.

For years nature has presented the spectacle of wasted energy in water courses, and the action of the governor and legislature in directing so important a work as the conservation of this wasted power meets the hearty approval of all who have given the subject serious thought.

The commission also gives the results of preliminary studies in different sections of the state. At the last session the legislature appropriated $75,000 for further investigations by the commission, and it is confidently expected that as a result of its work there will be an important development of our water powers and their conservation for the benefit of all the people of the state.

In connection with this it may be noted that the state last year established a precedent of requiring proper compensation for grants of power privileges in public waters.

Water-power privileges have been granted in the past without any provision for a payment to the state in return for what the state gives. These grants have frequently been made without proper reservations or conditions, and without anything constituting a suitable consideration. They have amounted simply to donations of public rights for private benefit. It does not fetter individual enterprise to insist upon protection of the common interest and due payment for what is obtained from the public. Last year, on the grant of a franchise to a development company which was to develop power from the St. Lawrence River, it was insisted that provision should be made for compensation for the privilege upon a sliding scale according to the power developed. And thus it was established that hereafter in the state of New York public privileges, on terms of justice to the investors and the public alike, must be paid for.

The conservation of our resources means not simply their physical preservation, but the safeguarding of the common interest in the bounties of nature and their protection both from the ruthless hand of the destroyer and from the grasp of selfish interest. The course of events in the state of New York during the past few years, which has been but imperfectly

described, is full of encouragement to those who have faith in the capacity of the people to protect their just concerns and to secure administration which places the general welfare above every consideration of mere private advantage. The progress in the state of New York to this end is significant of the healthy growth of sentiment which the meeting of this conference cannot fail further to promote.

FORESTRY BY THE STATES[1]

By Henry S. Graves

The work of the states in forestry conservation consists of (1) organized fire protection; (2) establishment of state forests, especially at the headwaters of rivers; and (3) promotion of forestry through assistance to private owners through reasonable taxation and education.

For a long time there have been in many states laws regarding the setting of forest fires. These laws have been ineffective, because there has been no public sentiment behind them and no adequate organization to enforce them.

In recent years there has been a distinct increase in the activities of the states in legislation looking to systematic fire protection. Through good laws, properly enforced, many causes of fire may be eliminated. Carelessness in the use of fires in clearing land, in burning brush, in leaving camp fires, in smoking, etc., may be largely stopped. Most fires from locomotives, sawmills, and donkey engines are not necessary, because there are practical appliances to prevent the escape of sparks from engines. When railroad fires occur it is usually because the best appliances are not used or are not properly used.

Adequate forest protection is, however, impossible without an organization to enforce the laws and to guard against fires. Laws designed to establish organized fire protection have been enacted in the following twenty-four states: California, Connecticut, Colorado, Idaho, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington, West Virginia, and Wisconsin.

As a rule, these states have a system of local fire wardens appointed by the counties or towns. Their duty is to repair to any fire in their respective districts and extinguish it. Usually the wardens have the power of arrest for forest misdemeanors, and may impress help for fighting fires. The organization of the fire wardens varies considerably in different states. In some there is a regular department of forestry

[1] From an article in the *Review of Reviews* on "The Advance of Forestry in the United States," April 10. Reprinted by permission.

headed by a state forester, who has, among other duties, supervision over the fire wardens. In other states this work is in charge of a chief fire warden, Forest Commission, or Fish and Game Commission. The best results are obtained by having a technically trained state forester, who will not only direct the work of the fire wardens, but have supervision of all other forestry interests in the state.

One of the chief defects in most of the fire protective systems is that they provide only for fighting fires, but do not provide for a systematic watching of the forests to prevent fires from starting. The idea of a systematic patrol has recently been introduced in a number of states. The new fire law of New York makes provision for the patrol of the forests, and it has already proved successful.

The most serious handicap in fire protection and in other state work in forestry has been the inadequacy of appropriations. Success in fire protection can only be secured by close organization and supervision of the force of fire wardens. This has been prevented in most states by lack of funds. For this reason the results have often been poor compared with what might be secured with reasonable further expenditures.

Another important feature of state forestry is the establishment of state forests. Their objects are to protect areas which should be kept under forest cover for the regulation of stream flow and the prevention of erosion, to furnish a demonstration in forest management for private owners, and to provide an assured supply of timber. New York takes the lead in acreage of state forests. Its reservations aggregate over one and one-half million acres, and the policy is to increase the acreage very largely. The state has a vigorous state commission and a competent force of foresters. Pennsylvania follows with a reservation of nearly a million acres. Other states that have started the policy of acquiring state forests are California, Colorado, Connecticut, Indiana, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Tennessee, Vermont, and Wisconsin. The total area of state forests now approximates two and three-quarter million acres.

A further duty of the states is to enact reasonable laws of taxation. The problem of taxation is being studied by a number of states and by the national government, but as yet little progress has been made toward a sane and uniform system. In the long run the present system of taxation, if continued, will contribute directly to forest destruction.

The states should help private owners, not only by aid in fire protection and reasonable taxation, but by advice given through the state forester as to the best practical methods of forestry. There is a large work which can be accomplished by the states in general educational work in forestry and in scientific research and experiment. This work locally applied would be along much the same lines as is conducted in a broader way by the government.

PRESENT SUPERVISION OF LIFE-INSURANCE COMPANIES, ITS MERITS AND DEFECTS[1]

By S. Herbert Wolfe, F.S.S.

There are some who maintain that state supervision of all kinds is merely a form of pernicious paternalism. Be this as it may, we are brought face to face with the fact that the supervision of corporations is becoming more extensive day by day, and the intention of the government not only to exercise supervisory functions, but to participate actively in the management of semipublic corporations, is well illustrated by the agitation relative to railroad rate-making. Since the state has decided that the best interests of its citizens are served by requiring its physicians, its dentists, its veterinarians, and even its barbers (New York state now requires "tonsorial artists" to pass examinations before the State Licensing Board) to demonstrate their fitness to practice, there is no real reason why it should not extend its protective system over the life-insurance policies held by its citizens. In fact, there exists a positive reason why it should do so, inasmuch as, life insurance being based upon mathematical and scientific principles, its essentials are beyond the knowledge of the average man. Were a banking institution to offer a man 6 per cent interest upon his daily balances, he would realize from his knowledge of business conditions that such an offer was inconsistent with proper and conservative banking methods; in consequence he would decide to have nothing to do with an institution that made such an offer. When an insurance agent, however, offers this same man a policy of insurance, he is unable to determine whether the premiums which he is to pay are adequate, or whether the company standing back of the contract is being conducted along safe lines. It is to be regretted that the history of the past twenty-five years in this country indicates that mere cheapness has been an unduly exaggerated factor in the mind of the insuring public. The rise of assessment organizations, their wonderful and unprecedented growth, and the subsequent failure of many of them, owing to the inadequacy of their premiums and their managerial mistakes, all point to the inability of the average citizen to select safe depositories for his insurance premiums.

The state has a vital interest in the successful administration of life-insurance companies. They are encouragers of thrift; upon the death of the wage earner the proceeds of the insurance policy are, in many cases, the only barrier between the family and pauperism. For that reason life insurance takes its place in the economic structure and occupies a peculiar niche, for it not only encourages habits of economy and compels periodic deposits of money (as contrasted with the voluntary deposits which are made in savings banks), but it exercises the more important

[1] Reproduced from *North American Review*, July, 1905. Reprinted by permission.

function of distributing the losses of the few among the many. It has been well said that nothing is so uncertain as the date of the death of any particular individual, and nothing is more certain than the number of individuals who will die in any given year. Insurance eliminates the hardship which would be occasioned by the premature death of the individual, in such a way that each of the contributors pays his share of the mathematical probability of his death during the given period. As an illustration of the recognition by the state of this peculiar economic relationship, it may be pointed out that in Europe we find a system of compulsory governmental insurance, covering not only death from all causes, but also disability from accident and disease.

It may not be uninstructive to show by a few concrete illustrations the extent to which life insurance has entered into the everyday life of the people. The United States leads the world in the size of the companies domiciled within its borders. Taking, for example, the records of three of the largest companies, we find that at the end of the last calendar year they controlled between them $1,242,731,113.35 of assets. Now bear in mind that an insurance company is not a productive corporation. It receives certain moneys; it invests them; it distributes these funds to the beneficiaries of the policyholders who die during the existence of their contracts, or to those who, by their survival of a stated period, are entitled to such participation. The corporation itself is therefore merely a collecting and distributing bureau. It produces nothing. It is the receiver, the custodian, the investor and disburser of the funds which its policyholders pour into its coffers. These remarks are equally true either for the life-insurance company with a capital stock or for one organized absolutely upon the mutual plan. In the former case there may be some charter or statutory provision which will permit the stockholders to receive certain dividends; but the distinction must be sharply drawn between the capital stock of a life-insurance company and that of an industrial corporation, for in the latter the operations are conducted and extended by means of the contributions of the stockholders, while in the former the policyholders contribute the assets.

It has been pointed out that three of these companies alone owned on December 31, 1904, nearly $1,250,000,000 in securities of various kinds. This great sum represents the contributions of individuals scattered throughout the civilized world, and numbering at that time 2,158,749. The foregoing facts have apparently been lost sight of in the reports of the internal strife in one of these corporations which have recently been so prominent in the daily press. Eminent counsel representing the various factions among the officers and directors have used all of their talents to secure advantages for their respective clients; but the great army of policyholders, the real owners of the assets of the institution, are a disorganized body unable to protect their own interests properly. The question naturally arises, therefore, Does the state, after bringing these

corporations into being, assume no responsibility for the safeguarding of the interests of the policyholders?

State supervision exists in every country. In Germany the government not only exercises powers of visitation and supervision over its insurance corporations, but actually participates in the management of their affairs, specifies the mortality tables to be assumed, the commissions which may be paid, the time when their profits shall be distributed to the policyholders, etc. In the United States we attempt to supervise our life-insurance companies by means of insurance departments existing in each of the fifty-one states, territories, and districts. These supervisors, in nearly every case, are appointed by the governors. In a very few instances (Delaware and Wisconsin, for example) they are nominated as are other state officers and elected by direct vote of the people. They have various titles, usually being called Superintendent of Insurance or Insurance Commissioner. In some cases the auditor of state is insurance commissioner ex officio, and in a perfunctory manner combines the supervision of insurance companies with that of state banks, savings banks, building and loan associations, etc.

It will be seen from this that the supervising officer is part of the political machinery of the state, and the besetting sin of American civic government — the political pull — is responsible for whatever lack of efficiency there may be in this important branch of the state government. It is an unfortunate fact that this office, which comes into such close and vital relationship with the interests of so large a number of citizens, should be handed out as a reward for political services. It must not be understood that this is a sweeping condemnation of all insurance departments or a denunciation of every insurance commissioner, for some have appreciated the importance of their duties, have cast off all political yokes and affiliations, and have succeeded in reforming serious evils which existed in the business. It is merely a criticism of a system which takes men with no technical education, places them in charge of one of the most important bureaus, and then, without regard to their honesty, efficiency, or record, sweeps them out of office and hands their positions to some new, inexperienced man as a reward for political services rendered at the last election. This condition of affairs is to be found in nearly every state in this country. The most notable exceptions are the New England states, where many of the insurance commissioners have been in office for a great number of years, and are thus, by their experience, enabled to serve the interests of their policyholders with fidelity and ability.

The method of appointing or electing the supervising officer has been touched upon before referring to the statutes themselves, for, no matter how good or how bad the laws are, their beneficial effect is directly proportionate to the efficiency of the supervising officer. Given a state whose statute books contain a set of ideal insurance laws, but whose supervising officer is weak and inefficient, and it will be found that the

results attained, as far as the interests of the policyholders go, are inferior to those of some neighboring state whose insurance code is less elaborate, but where the supervising officer is a man of sterling integrity, imbued with the knowledge of the importance of the duties assigned to him, and determined at all hazards to protect the interests of his policyholders.

The duties of an insurance commissioner are threefold:

First. To see that the insurance laws of his state are obeyed.

Second. To see that the policyholders receive equitable treatment from the corporations under his supervision.

Third. To see that the corporations receive fair treatment.

The insurance laws of most of the states are in a deplorable condition. They were enacted at a time when life-insurance companies had not attained their present growth, and consequently are inadequate to meet the needs of the present conditions. The chief points of regulation which are aimed at in the insurance laws may be briefly summarized as follows:

(1) *The establishment of a standard of solvency by which the financial condition of the organization may be tested.* It is apparent that the ascertainment of the outstanding liabilities of an insurance corporation is a much more difficult proposition than is met with in determining the liabilities of any other financial institution. The present value of a life-insurance contract is dependent not only upon the accumulation of interest, but also upon the operation of the law of mortality. A life-insurance company may have more than enough funds on hand to pay all of its accrued death claims, and still be in such a perilously insolvent condition as to render its further operations extremely hazardous. The principles upon which legal-reserve insurance companies are founded contemplate the establishment of a sufficient amount in the early years of the history of a life contract to overcome the deficiency in later years caused by the naturally excessive mortality resulting from old age. It is absolutely necessary that a company should have sufficient funds on hand, available for payment in the future, to equal the present value of these contracts. The state therefore prescribes a mortality table and a rate of interest which may be applied in calculating the present value of a company's policy contracts. Companies are required to list their policies, send their lists to the Insurance Department of the state in which they are domiciled, and the actuarial department then ascertains the liability on account of such contracts.

(2) *Prescribing the investments in which a company may invest its funds.* It will be recognized that this is one of the most important features of supervision; for if the funds of a life-insurance company be invested improperly, the entire structure must fall to the ground. The laws of nearly all the states permit companies to purchase sufficient real estate for the conduct of their own business. This has been, by practice, construed to permit a company to erect a large office building, but a small part of which is occupied for its own operations. It goes without saying, of course,

that companies are permitted to take title to such real estate as they are compelled to acquire under foreclosure, although the laws of many of the states require such property to be sold within a given time, usually five years, unless the necessary certificate is secured from some state officer setting forth that a forced sale would result injuriously to the interests of the policyholders. A large part of the funds of insurance companies is invested in bond and mortgage on real estate, and the laws usually prescribe that such real property shall be improved, unincumbered, and worth 50 per cent more than the amount loaned thereon. The weak part of this requirement is that it makes no provision for ascertaining the actual worth of the property. The restriction is therefore valueless.

The next broad subdivision of investments is the bonds and stocks. The statutes of a state in which are located large insurance interests provide that, after making the deposit with the superintendent of insurance, the residue of the capital and the surplus money and funds "may be invested in, or loaned on the pledge of, any of the securities in which deposits are required to be invested, or in the public stocks and bonds of any one of the United States, or, except as herein provided, in the stocks, bonds, or other evidence of indebtedness of any solvent institution incorporated under the laws of the United States, or of any state thereof." Companies are not permitted to loan upon or own the stock of any other insurance corporation transacting the same kind of business. It will be seen at once that the field of investment permitted under this act is so broad as to contain practically no restrictions. It is responsible for many of the evils which have crept into the business, and which must, in the very near future, be remedied, in order that the institution of life insurance shall occupy its legitimate field. It was never intended that the funds of any corporation of this kind should be used for the purpose of controlling subsidiary corporations engaged in the transaction of other forms of commercial enterprises. The spectacle of insurance companies owning the controlling interest in the stock of banks, trust companies, trolley roads, and industrial corporations of various kinds, is neither a pleasant nor a reassuring one. The evils to which such a condition of affairs can lead have been given great prominence in recent public prints. If the supervision of insurance companies is to be worth anything, it must, in the very near future, devote its serious consideration to the establishment of more rigorous standards, preventing the use (or misuse) of the policyholders' contributions for personal gain or aggrandizement. In addition to the foregoing, companies are permitted to loan to their policyholders an amount not exceeding the reserve which is maintained on their policies. This constitutes one of the safest and most desirable investments which a company can make. It is hard to imagine a more thoroughly secured loan than one of this character. Should the policyholder die, the loan, by its terms, immediately becomes due and payable, and is deducted from any proceeds which are turned over to the

beneficiary. It is dependent for its security upon the progress of no outside institution. It can never be repudiated, as have been the bonds of some municipalities. If the policyholder permits his policy to lapse, the company is amply protected; for it has in its possession the man's reserve, which, it will be borne in mind, is the excess payments which he has made to provide for the maintenance of a level premium throughout his contract.

(3) *The ministerial functions.* Under this heading comes the important duty of preparing and distributing the blanks upon which the companies are required to render an annual account of their transactions of the previous calendar year. The development of this blank is a most interesting one. It is not so very long ago that a primitive form then in use gave practically no insight into the true condition of the corporation. The gradual introduction of more scientific methods and of a more detailed analysis of the various items has produced a statement form which enables an experienced observer to obtain a fair knowledge not only of the financial condition of the company but also of its methods of operation, its expenses of management, its ability to keep its business upon its book, etc. It may be interesting to know that the last blank adopted by the National Convention of Insurance Commissioners of 1902 subdivided the income of companies under twenty-seven heads, the disbursements under twenty-nine, the assets under twenty-seven, and the liabilities under twenty-four. It will be seen from this that a fairly comprehensive analysis has been attempted.

(4) *The power of visitation.* To require corporations to make periodic reports and to provide for no way of verifying such reports would manifestly be ridiculous. In consequence the insurance statutes of nearly every state provide that the head of the department, or somebody selected by him, is authorized to visit the office of any insurance company transacting business in his state, for the purpose of making an examination of its condition and ascertaining whether the laws of the state have been strictly complied with, and whether its operations give indication of having been conducted along conservative lines. There is no more important duty intrusted to the supervising officer than is this one. He must take all of the necessary precautions to assure himself that the property which the company displays for his inspection is owned absolutely by it; that the lists of policies submitted to him for valuation are complete and in accordance with the terms of the contracts, for to verify the assets without looking after the liabilities would be worse than useless. If he finds that a company fails to pay its death claims promptly, is being conducted for the benefit of its officers and directors rather than its policyholders, is developing into an institution whose funds are used for the promotion of industrial or financial enterprises rather than in the field of legitimate investments, it becomes his duty to attempt to correct such abnormal conditions. Publicity, it will be found, is the greatest corrective of corporate

evils, and every policyholder is entitled to know every detail which directly affects his contract. No institution conducted along safe and conservative lines need fear the searchlight of publicity.

It is greatly to be regretted that, in the past, some unscrupulous commissioners have used the examining statutes of their state as a means of securing pleasure trips around the country at the expense of the companies examined. At one time there was an epidemic of this pernicious activity on the part of certain men temporarily clothed with great authority. It is practically unheard-of to-day. The responsibility, however, of determining whether a company is fit to transact business within a state is one which is placed in the hands of every commissioner. He is not authorized to delegate this power to the commissioner of any other state, and it becomes the duty, therefore, of every conscientious state officer to investigate for himself, if he has any reason to believe that the home department is incompetent or unwilling to make the proper investigation.

The above brief résumé of some of the duties of the head of an insurance department will serve to indicate the great responsibility attaching to the office. The technical nature of the life-insurance business, its close affiliation with the financial world, and the great number of citizens interested in its successful administration, are all arguments for the elimination of the political nature and character of the office. The judicial frame of mind, so necessary to the proper contemplation of the problems arising in connection with supervision, is only acquired after years of practice and experience. To expect a man trained in other walks of life to develop suddenly into a competent supervisor, is to ask the impossible. Life insurance is a huge structure, and its erection must be watched by competent eyes. If the foundation be placed upon shifting sands, if the materials entering into the building are of inferior quality, or if the work of upbuilding is conducted improperly, the structure will fall to the ground, bringing desolation and ruin to great numbers. It is to the credit of state supervision that such good work has been accomplished with such poor tools. With the full realization upon the part of the people of the cost to them of the failure of a weak and pliable commissioner to do his duty, may we not hope that, before another decade passes, we shall see the office stripped of its political nature and its administration in the hands of men equipped by education and training to protect the interests of the millions of policyholders throughout the world? When that time comes, the funds of a life-insurance company will never be regarded as a means whereby one group of financiers may profit at the cost of another group. The title to the funds will rest securely in the policyholders, and the only thing needed to effect this transformation is the realization upon the part of the policyholder of the necessity for it.

SEPARATION OF THE SOURCES OF STATE AND LOCAL REVENUES [1]

By T. S. Adams

It is important to note that separation of state and local revenues has ceased to be merely an end in itself, and has taken on added significance as the initial step of a thoroughgoing reform. "We are justified," says the recent Missouri Tax Commission, "in saying that this separation of the sources of state and local revenues is now generally recognized as the first essential step in any enduring tax reform."

The second step, in the opinion of most writers and tax commissioners who have recently considered this subject, is the so-called "home rule," or "local option." "Separation," says the report of the California Commission (of 1906) on Revenue and Taxation (p. 11), "establishes, at once, home rule in matters of taxation." And so, similarly, the report of the Missouri Commission of 1907 (p. 10): "The local taxing districts, the counties and cities of the state, will then [when separation is effected] have practical home rule in matters relating to taxation." And, "as regards the question of adequate local revenue, the simplest plan indeed," as Professor Seligman expresses it, "is to have a separation of state and local taxation, with local option on the part of the localities to tax or to exempt from taxation whatever classes of property they see fit."

From these expressions it would appear that the dual program of separation and home rule is one, primarily, of financial decentralization. The state government having taken over most of the fees and license taxes, nearly all of the corporation taxes, and perhaps some of the taxes on personal property, in addition, of course, to the inheritance tax, blandly says to the wondering little local governments gathered about the maternal knee: "Now, little children, you are free. Go your way and I shall go mine. I shall keep the taxes and revenues just mentioned, and you — you may have the general-property tax. Considering the liberality of the division, I confidently expect you to be able, in the future, to get along without the pernicious and demoralizing tax on personal property."

This thorough divorcement of state and local revenue systems is, on the surface, exceedingly attractive to almost every one. The economist looks upon it with favor because it promises the abolition of the personal-property tax. The single taxer applauds it because it legalizes the exemption of improvements as well as that of personal property. The business man approves it because it offers a means of securing honorably and openly that exemption of plant and stock which so many merchants and manufacturers at the present time are securing illicitly and covertly. Of course it may mean, instead of exemption, more strenuous

[1] Read at the National Conference on State and Local Taxation, held at Columbus, Ohio, November 12–15, 1907, under the auspices of the National Tax Association.

attempts to assess personal property, and increasing efforts, in most localities, to lighten the load upon real estate by increasing the burden upon business. But the advocates of home rule are willing to take their chances. The program of reform apparently promises greater liberty to everybody concerned, and, as consistent Democrats, they properly refuse to be frightened by the fact that liberty may degenerate into license.

Despite its attractions, however, I believe that, on the whole, the program just described — the idea of complete separation of state and local finances with fiscal autonomy in each sphere — is impossible of realization and retrogressive in direction, making away from and not toward the real solution of our most important problems. I believe that real progress lies in the direction of centralization, not decentralization, of fiscal control. The reasons for this statement must be discussed in some detail.

I. In the first place, separation and home rule cannot materially increase the positive fiscal freedom of the local governments. It is doubtful whether they can safely be permitted to exempt any class of property they desire to relieve from taxation; but it is perfectly plain that they cannot be allowed to devise new taxes. Take the income tax, for example. Not only would it be impossible for a local government to administer the income tax without the right to call upon other officers of the state for information and assistance, but the difficult definitions and interpretations of income which the various local governments might introduce would bring about an intolerable amount of multiple taxation. Or take the much more feasible project of license or business taxes upon commercial and manufacturing concerns in lieu of the present taxes upon plant and stock. The various local districts of a state could never be permitted to define and manipulate such taxes as they might see fit. Suppose a manufacturing concern had its factory and warehouse in village A and its principal office and salesroom in city B. The village might impose the present property tax on plant and stock, while the city might, by adopting some plan of apportioning the total capital value of such concerns according to business done or gross income, tax practically all of this property again in another way. Furthermore, the local governments could not safely be permitted to tax individual categories of personal property as they saw fit. Take mortgage taxation. County A might institute a recording tax and county B the separate taxation of mortgages as personal property. Yet an individual mortgagee residing in B might lend his money in county A, with the result that, whether mortgagee or mortgagor ultimately paid the tax, it would be double or multiple taxation of the most vicious kind. In general, it is a safe conclusion that the income tax, business taxes, and all manner of ad valorem assessment in the spirit of the so-called unit rule would have to be denied the local governments under the scheme of home rule. With the growing and commendable practice of distributing the intangible values of going concerns in accordance with their business or tangible property, it is doubtful

whether even the method of assessing tangible property can be left to the discretion of the local governments. The opportunities for double taxation are too manifold. While the habitation or occupancy tax might safely, perhaps, be left to the local governments (although even this is problematical), most of the possible substitutes for the personal-property tax can be introduced only as state taxes. As a matter of fact it is probable that the average legislature will never permit the local governments to bid against each other for the location of manufacturing concerns, although the *pros* and *cons* of this particular scheme seem to be evenly balanced. In other words, the tax laws for the local districts will always have to be made by the state legislature.

Evidently, then, the phrase "home rule" does not mean exactly what the words imply. We want the local governments to have the liberty to exempt personal property, but we do not want them to have liberty to tax corporations as they please. We are advocating freedom when what we want, or at least the only thing we can have, is another kind of control. What we need is not less state regulation in the matters of local taxation, but more intelligent state regulation.

II. Not only is centralization a good thing, but we are getting more centralization every day. If we examine the forward movement which has resulted in partial or complete separation in several of our most progressive commonwealths, we find that it was aimed primarily at the reform of corporation taxation, and achieved separation incidentally, largely as a by-product. (Wisconsin, for instance, has ceased to levy property taxes for the support of the state government, but there has been no popular demand for separation in Wisconsin, practically no discussion of the subject, and little attention paid to it.) Corporation taxation under the old régime, when controlled by the local governments, had proved a striking failure; the assessment of such corporations had to be centralized, and in the process of centralization the state retained many corporation taxes simply because it was difficult to apportion corporate values, for purposes of taxation, among the various local districts. These corporation taxes proved so lucrative in many cases that it became practicable to discontinue the levy of state property taxes.

Now there is just one element common to this movement in practically all states. It is not the separation of state and local revenues. Many advanced states, Massachusetts for instance, are not yet within striking distance of separation. Neither is it the complete retention of corporation taxes by the state. The one characteristic of the advance movement which is always and everywhere found is centralization of the assessment power. The most striking characteristic of the past has been the decentralization of the administrative machinery of taxation. The most striking feature of the present is the universal and rapid progress toward centralization of fiscal control. And the banner of reform is being carried by the State Tax Commission.

It is unnecessary to discuss in detail the evolution of the permanent Tax Commission. At the present time permanent commissions exist in at least eight states, and scarcely a year passes without the creation of a new commission. As the number of such commissions increases their functions are multiplied. At first they did little more than assess a few important classes of corporations. Gradually new duties, broader powers, were added; they were instructed to provide uniform blanks for local assessments, to assist or actually to make state equalizations, to inspect and criticize the work of local assessors, to revise county equalizations, and order reassessments of property. To-day the tax commissions of seven states are empowered to institute proceedings for the removal of inefficient assessors; in seven states they are authorized to add property to the assessment rolls or to order the reassessment of particular parcels of property; in four states they may order the reassessment of entire districts; and in six states they are authorized to renew and readjust the county equalizations. It requires no unwarranted stretch of the imagination to foresee a time when the whole machinery of local and state assessment, in the more advanced American commonwealth, will be coördinated and correlated under the control of a high-grade permanent tax commission; when a permanent corps of expert assessors, holding office during good behavior and absolutely divorced from politics, will banish from American administration and American politics the miserably inefficient local assessor. It is because I see in the present program of separation and home rule the potential beginnings of a countermovement to this centralization of assessment, which seems to me so supremely important, that I take upon myself the unpleasant task of scrutinizing so critically the possibilities of a program with which, in the main, I am in hearty sympathy. If home rule, local option, and fiscal decentralization militate in any important way against the reform of the local assessment work, they are not worth the cost.

III. The position just taken — the proposition that separation should be judged accordingly as it strengthens or weakens the character of the assessment work of the state — may be regarded as the central thesis of this paper, and the remainder of my time will be devoted to the consideration of a somewhat miscellaneous group of topics bearing upon this point.

First of all I desire to recall to your attention the very familiar and exceedingly important fact that, measured in dollars and cents, the work of the local assessors is far and away the most important part of our fiscal system. Compared with the general-property tax, corporation taxes, inheritance taxes, and all the other taxes put together pale into insignificance. In 1902 more than three fourths of all the general revenues of the state and local governments came from taxes upon general property, and if the state taxes levied upon general property in that year had all been secured in some other way — say by subventions from the federal government — even then two thirds of the aggregate general revenues of the

state and local governments would have been raised by local taxes upon general property. Whether we keep or discard the taxation of personal property, the local assessor will, for many generations, continue to play the principal rôle in the work of state finance, and upon his probity and efficiency will depend the real success or failure of our fiscal system.

Now in recent years the statement has frequently been made that separation itself, carrying with it the cessation of state taxation upon general property and the abolition of the state equalization, would prove the most effective means of improving the work of the local assessors. The report of the California Commission on Revenue and Taxation is particularly enthusiastic on this point:

> If there were no state tax to be apportioned among the counties, on the basis of local assessed valuation, there would be no object or inducement to the assessor or to the citizens of the county to obtain a low valuation. In fact, there would be more inducements to the assessor to assess the property as nearly as possible at its full market value in order to avoid inequalities between the citizens among his own constituents, and to protect himself against the charge of favoritism. The probability is, that in order to enjoy the advertising effect of a low tax rate the great inclination would be for the assessor to raise the valuation rather than reduce it. A high tax rate is bad advertisement for a city or a county, and if there is no state tax to be imposed upon the same valuation, the county could have the advantage of the low rate by the simple process of raising the assessed valuation from its present level of about 50 or 60 per cent to its full value (pp. 62, 63).

With this interpretation of the probable effect of separation I find myself wholly unable to agree. The influences or factors responsible for inefficient assessment work are so numerous that the desire to evade state taxes is really a negligible consideration. Enumerate these factors: first, the inherent difficulties of the task; next, the political atmosphere in which the assessor too often works; then the insufficient time, insufficient pay, desire to evade county taxation, desire to favor personal friends and political associates, — enumerate these factors, and it is plain, without reference to experience, that the mere discontinuance of state taxation of general property can work no appreciable improvement. If reference to experience is needed, I can only say that the practical separation accomplished in Wisconsin has not, in the opinion of those best qualified to judge, exerted any appreciable influence upon the character of the assessment work. There is the same old struggle over the county equalization, the same old strife between city and county, the same old scramble of the individual taxpayer to get from under the local assessment.

How could it be otherwise? Of the general property taxes — $706,660,244 in all — collected in this country in 1902, only $83,320,134, or 11.6 per cent, went to the state governments, while $624,340,110, or 88.4 per cent, went to the counties, cities, and other local divisions. These figures furnish a good measure of the part which the desire to

escape state taxes plays in demoralizing local assessors. The counties alone collected nearly 75 per cent more under the general-property tax than the states. If the state governments should abandon the $83,320,-184 which they are now (or were in 1902) levying on general property, there would still remain $624,340,110 to be distributed and equalized among the taxpayers of the local divisions. For the state government to abandon this greater task of equalization is a cowardly evasion of its chief duty.

Another current impression, which I believe to be similarly erroneous, is the idea that if the personal-property tax is abolished, the assessment of real estate will be on the whole equitable and satisfactory. "The local taxation of real estate," says the recent Special Tax Commission of the state of New York (p. 6), "is now on the whole free from any serious objection." This may be true of New York, but it is certainly not true of most American states, and cannot become true so long as assessors are selected according to prevailing practices, and work under present conditions. During the past four years I have devoted a large part of my time to an intimate study of real-estate assessments, in a state in which the quality of the assessment work is rather above than below the average. During that time I have compared, in the case of several hundred thousand parcels of real estate, the true value as determined by actual sale with assessed value as determined by the local assessors. The deliberate conviction, forced upon me by this examination, is that the real-estate assessment is, on the whole, a marked failure from the standpoint of equality. In assessment districts in which the average ratio of assessed to true value is maintained consistently at 65 or 70 per cent, individual parcels will be assessed all the way from 20 to 120 per cent of true value. We talk glibly about the ease with which real estate can be assessed. The truth is, that it is a task which challenges the highest skill of bona fide experts. Think of the speculative uncertainty of the value of farm lands adjoining city suburbs; the baffling variety of fixed plant and machinery ordinarily assessed as real property; the problem thrust upon the county assessor by the presence in some small village of one or two manufacturing plants of whose value only an expert of long experience in that particular industry can furnish any estimate; and I think you will agree with me that the problem of assessing real estate efficiently cannot be left to the local assessors, that it demands expert treatment which only the general government, by dealing with such problems in a wholesome way, can afford to provide.

Finally, I desire to call attention to the fact that separation does not really abolish the state equalization nor prevent the distribution of the burden of state taxation among the various local divisions. What separation actually does is to substitute for a conscious distribution of state burdens in accordance with the value of property, an unconscious, unseen, and more or less haphazard distribution, which shifts the burden we

know not where, and avoids the evil of faulty equalization according to property by flying to other ills we know not of. Like the ostrich in the thunderstorm, we stick our heads in the sand and stoutly maintain that it is not raining.

Consider the proposition a moment and it will cease to be merely fanciful. Ordinarily separation can only be realized by the state's retention of the more important corporation taxes. Some of the corporations involved, or, more accurately, some of the taxable corporate values involved, like trust companies in New York, might with equal propriety, in whole or in part, be assigned to the local governments for taxation; and when they are not so assigned, such local divisions bear *pro tanto* the burden of supporting the state. And other things being equal, assignment to the local divisions should be the rule and not the exception. Unless there is no natural relation between property or business and the expenses of government, there is a *prima facie* presumption in favor of local taxation; and this initial presumption is indefinitely strengthened by the enormous fiscal burdens under which our municipalities are now staggering. For it is probably true, although I speak with hesitancy on this point, that separation as it is ordinarily achieved considerably increases the burden of the city governments, in the sense that the cities would probably receive the major portions of such corporate values if they were localized according to the best principles of apportionment.

Many persons will commend separation for this very reason, on the ground that the enormous escape of personality in the cities makes the latter fit recipients of increased state taxation. But I believe this contention is unsound. It loses sight of the stupendous social tasks thrust upon our cities by the mere growth of population. City government, to a large extent, is characterized by what the economists call the law of increasing costs. And it loses sight of the still more important fact, that shifting a larger load of state taxes upon the city communities is not going to get the extra load on the shoulders of the men who evade the personal-property tax. In short, it fails to improve the distribution of taxes between man and man in the city.

Moreover, it is not only corporation taxes which the state governments have monopolized. The largest source of state revenue in New York is the liquor license; there would be no difficulty in assigning that revenue to the appropriate local divisions. The second most productive source of state revenue in Pennsylvania is the tax or group of taxes on personal property. Are its burdens distributed among the local districts, and if so, is the distribution more or less equitable than that which would be accomplished by a conscious state equalization? In order to separate the sources of state and local revenue in California, the Commission on Revenue and Taxation of that state proposes that the central government shall retain, in addition to the poll, inheritance, and insurance-premium taxes, all taxes upon steam and street railways; express companies; car

companies; light, heat, and power companies; telegraph and telephone companies; the corporate excess of banks; and all corporate franchises not covered by the above taxes. Unless the presence of property at a place has no connection with the public expenditures of that place, unless the right to exploit the commercial opportunities of that place creates no obligation to pay taxes at that place, unless the Adams Express case is moonshine and the principle of the Ford Franchise Law a delusion, then street-car companies, heating and lighting plants, most banks, and some telephone companies owe most of their fiscal allegiance to fairly well-defined local districts; and when these local districts are deprived by the state of the power of taxing such corporations, they are saddled with burdens of state taxation which belong elsewhere.[1] The unseen equalization involved in separation is a very real phenomenon. Certain it is that no state legislature should decide to separate the sources of state and local revenues without clearly understanding that under any scheme the expenses of the state government must be distributed in some way among the various local divisions, nor without satisfying itself that the new distribution of state burdens proposed will be more equitable than the old.

The practical conclusions which I would derive from the preceding discussion may be formulated in the following statements:

(1) The state legislature should, in my opinion, without reference to the local divisions and without respect for impossible plans of local fiscal democracy, abolish the personal-property tax and introduce a substitute therefor, if one can be devised.

(2) If this is impracticable, they should introduce at once some scheme of limited local option which will permit particular districts to abolish that fiscal abomination, the personal-property tax. No plan should be entertained, however, which will interfere with central suspension of assessments and central control over county equalizations.

(3) This carefully limited measure of local option should be introduced without reference to the separation of state and local revenues.

(4) Similarly, the question of what sources of revenue should be retained by the state ought to be settled absolutely on its merits without reference to home rule, by a careful study of tax jurisdictions and the connection between property or business and the expenses of local government. Doubtful points should be decided in favor of the local jurisdictions, and equitable apportionment should not be strained one inch in order merely to supply the state with revenue enough to get along without the levy of direct property taxes. If, after the apportionment of sources between state and local governments, the state has not sufficient special revenue to pay its expenses, let the deficit be raised by a state tax upon real estate, including in real estate the corporate and commercial

[1] The California plan is cited merely for illustrative purposes, and not with the idea of criticizing the California Commission. Under ordinary circumstances such a division of revenues seems manifestly unjust.

values assigned to the local governments. The evils of an equalization based upon real estate are less than the evils of the unconscious, haphazard equalization involved in the retention by the state of a number of revenues which more logically belong to the local divisions.

(5) Finally, I assert with some confidence, that if the equalization is confined to real estate, and if it is made by an efficient tax commission which takes its work seriously, it is not a curse but a blessing. In the first place, the payment of some direct state tax stimulates the interest of the citizen in the expenditures of the state government. In the second place, the equalization can be made, with all necessary accuracy, so accurately in fact that no fair-minded person, after studying thoroughly the conditions of the problem, will question its substantial accuracy as between county and county. It can be made without prohibitive expense; it is not necessary, as is sometimes asserted, to reassess every parcel of real estate in the commonwealth to get at the truth. And in gathering the data upon which to base its conclusions, the Tax Commission will obtain indispensable information concerning local assessment work, besides securing material absolutely necessary for the proper performance of the work of county equalization. The county equalizations are, in the aggregate, more important than the state equalization; but at the present time they are woefully inaccurate. The county officials who make these equalizations are, as a rule, destitute of reliable data upon which to base their apportionments, and, like the local assessors, they will never do their work efficiently until they are forced to do so by central supervision and state aid. Reform in these matters must come from without.

STATE SUPERVISION OF LOCAL FINANCE [1]

By John A. Fairlie

Mr. Bryce cites as one of the merits of our federal system of government, that the separate states can try experiments in legislation and administration, and that other states profit by the experience of those who first introduce new methods. Both of these statements can be supported by important evidence; but the benefits derived in this way have been much less than they might have been, owing to the lack of means for bringing the results of experiments in one state to the attention of other states. This association can in some measure supply this need, and reduce the enormous waste in experimental legislation, by furnishing a clearing house for the interchange of notes on the work of the various states. And this paper is a small contribution in that direction, calling attention to some significant legislation in a number of states, and showing the correlation of measures apparently unconnected.

[1] Reprinted from the *Proceedings of the American Political Science Association*, Chicago, December 28–30, 1904.

Local administration in the United States during the first half of the nineteenth century developed steadily in the direction of a completely decentralized régime. Our constitutional system inevitably made the local authorities subject to the state legislatures, and there was always a large amount of legislative control limiting the scope of local action. But within the limits of powers conferred by the legislature there came to be no administrative supervision over the acts of the local officials.

During the last half century there has been in evidence a counterwave, making its way slowly and with difficulty, and as yet far from overcoming the earlier tide, but nevertheless gaining in force as time goes on. In many branches of administration there have been established state officers and boards with varying powers of inspection and supervision over local officials. This has been the case in the field of health regulation (of which we have just heard), in charity administration, in school management, and in local finance.

It is with the movement toward state administrative supervision in the last named of these fields that this paper is concerned. It is proposed first to describe what has been accomplished in those states where most has been done, and then to consider the general principles of a wise policy in this matter. What has been done has been mainly in reference to taxation and accounting. What will be said as to a general policy will consider also the question of local indebtedness.

Taxation

Local authorities in this country have only such power of taxation as is conferred by the legislatures. And as yet no local authority in this country has been given power to determine for itself what kind of taxes it should levy, but may levy only those taxes specifically authorized by statutes. There is therefore no room for administrative supervision in this direction, since the local authorities have no sphere of independent action.

As to the rate of taxation local discretion is also closely limited. For some taxes, notably the tax or license for the sale of liquors, the state law specifies the rate as well as the nature of the tax; for the general-property tax more leeway is given. But on the one hand the local authorities are compelled by statute to levy taxes to meet certain expenditures, and on the other hand are usually restricted as to the aggregate tax rate; and between this Scylla and Charybdis a narrow course must often be steered. Under these circumstances again there is little opportunity for administrative supervision, and none has developed.

When, however, we turn to the assessment of property for the general-property tax, we find a wide field for local discretion, and in recent years significant steps in the direction of administrative supervision. Under the methods prevailing in the early part of the nineteenth century local assessors had complete freedom in the valuation of property, not only for

local taxes but also for state taxes. It was in reference to the state taxes that the first step was taken in the direction of administrative supervision. Beginning apparently in Ohio in 1825, state boards of equalization have been established in most states, with power to change the aggregate valuation of counties so as to equalize the apportionment of the state tax. These state boards of equalization differ widely in their organization, but none of them have the necessary means to perform their work satisfactorily. In some states they have been composed only of ex-officio members, elected to other positions, and therefore unable to give much attention to their duties in regard to assessments. In several states the boards are composed of a large number of members, elected in local districts, who give only a small part of their time to this service, — the extreme case being found in Ohio, where it is composed of forty members, who meet once in ten years. In a few states, as New York and California, there is a small number of salaried members, giving most of their time to this work and that of direct assessment; but even in these cases it is impossible for the board to make a complete investigation of the local assessments that would be necessary for an accurate equalization.

Tax commissioners and economists have discussed at length the failures and defects of these boards of equalization. Moreover, they do not come strictly within the subject of this paper, and have been noted simply as the first stage of supervision which paved the way for later centralizing developments. We may therefore proceed to consider the latter, considering them in the logical rather than in their chronological order.

It may be noted here that these centralizing tendencies in relation to local taxation have been but one aspect of more general changes in the tax laws. And it may be said that it was only after the states had introduced some control over the administration of assessments for state revenue that the importance and complexity of the work of local assessors and the need for effective supervision over their local duties was understood.

Effective state supervision over local assessing officers seems to have been first established in Indiana. In 1891 there was established in that state a state board of tax commissioners, consisting of two salaried members in addition to the ex-officio members of the former State Board of Equalization: to prescribe all forms of books and blanks used in the assessment and collection of taxes; to construe the tax and revenue laws of the state and give instructions to local officers when requested; to see that all assessments of property were made according to law; and to visit each county in the state at least once a year to hear complaints, collect information, and secure compliance with the law. Besides carrying out these mandatory powers, the state tax commissioners have since 1894 annually called the county assessors of the state to an annual conference.[1]

[1] Rawles, Centralizing Tendencies in the Administration of Indiana, pp. 273, 276.

In 1896 a board of tax commissioners was established in New York with somewhat less authority, including the power to investigate and examine methods of assessment within the state; to furnish local assessors with information to aid them; and to ascertain whether the local assessors faithfully discharged their duties.

A Michigan statute of 1899 provided for a board of tax commissioners with power: to exercise general supervision over the local assessing officers; to confer and advise with them as to their duties; to visit each county in the state once a year, to hear complaints and secure the full assessment of all property in the state. They were also empowered to summon and examine witnesses under oath, to inspect the local assessment rolls, to change the assessment, and to add to the rolls property not assessed.

And a Wisconsin statute of the same year [1899] provided for a tax commissioner with two assistants to have general supervision over the system of taxation throughout the state, with specific authority to require reports from local officers. Two years later added powers were conferred to supervise local assessors and boards of review; to advise and direct local assessing officers, and to initiate proceedings to enforce the laws against negligent or delinquent officials; and to visit the counties and investigate the methods of local assessors. Another statute of 1901 created the new office of county supervisor of assessment, with powers of supervision over town and city assessors.

These administrative measures have not solved all of the difficulties connected with the assessment of property for taxation, but in most of these states they have brought about a decided improvement both in methods and results. Statistical results are less striking in New York than in the other states, partly, perhaps, because the powers of the state tax commissioners are less, and partly because of the subsequent development of special taxes for state revenues, which has apparently caused a relaxation of the supervision of local assessments, now used mainly for local purposes. But in Indiana the assessed valuation of real estate was increased by 44 per cent in one year after the new system went into effect;[1] in Michigan the assessed valuation of property has increased over 60 per cent from 1899 to 1903;[2] and in Wisconsin, where the most thorough system of supervision has been established, local assessments more than doubled in three years.[3] And it may be further noted that in each of these three states the aggregate assessed valuation of property is from 30 to 50 per cent larger than in the neighboring state of Illinois, whose population and wealth is more than double that of the other states, but where there is no efficient system of supervision.

[1] $553,937,744 in 1890, $898,600,323 in 1891 (Rawles, p. 276).
[2] $968,189,097 in 1899, $1,537,355,738 in 1903.
[3] $648,035,848 in 1899, $1,369,811,147 in 1902 (Report Wisconsin Tax Com., 1903, p. 10).

Years before these recent measures for the supervision of local assessors there began the policy in many states of a more complete centralization in the assessment of special classes of property, especially railroads, and more recently other transportation companies, and also telegraph and telephone companies. In fact, only in Rhode Island, New Mexico, and Texas are railroads still assessed only by local authorities. In some cases this centralization of assessment has been part of the movement to secure such taxes for the state treasury; but in a number of states, notably in Indiana and Illinois since 1872, the state assessment of such property has been used for purposes of local taxation. Usually this centralized state assessment has been established only for the property of corporations extending over a large number of local taxing districts; but in New York, under a law of 1899, the state tax commissioners assess for local taxation the value of special franchises in the public streets, which are for the most part held by local companies; and in 1901 the Indiana Tax Commission was given charge of the assessment of street and electric railways. The New York Franchise Tax Law has been of great value in drawing attention to a large amount of wealth that had previously escaped taxation; but it may be questioned whether the separation of the franchise from other property elements or the complete centralization in the assessment of distinctly local property is necessary or altogether advisable. In other states the value of such special franchises is now often included (without additional legislation) in the general assessment of the owners in the ordinary course of valuing property for taxation.

Auditing and Accounting

State supervision over local accounts is as yet less developed than state supervision over local assessments. This is perhaps not surprising in view of the fact that in most states the accounts of state finances are very far from satisfactory. It is true there have been state auditors and comptrollers since the establishment of state governments, and in some cases similar officers in colonial times; but the functions of such officers have often been limited, while primitive methods of bookkeeping established in the days of insignificant financial transactions have remained in use after expenditures have come to be counted in millions of dollars, and in the face of the development of systematic accounting in private and corporate business. Indeed, the imperfect and inadequate accounting methods of the larger cities have often been somewhat better than those of the states within which the cities are located.

But within recent years there have been significant measures taken both to establish satisfactory accounting systems for the state finances, and also to establish state supervision over the accounts of local officers. It is only the latter part of this development that can be here considered.

Massachusetts seems to have been the first state to have undertaken any effective control over local accounts. And here the supervision has been confined to officers of the counties, which in that state have never developed any vigorous local autonomy. Thus appropriations and tax levies for each county except Suffolk have long been voted by the legislature, although this is largely a matter of form and the estimates and proposals of the county commissioners are regularly adopted. In 1879, however, the commissioners of savings banks were authorized and required to inspect the books and accounts of most of the county officers, with power to require uniformity in methods of keeping accounts and financial reports in accordance with prescribed forms. In 1887 the state supervision was made more effective by placing it in the hands of a newly established office of comptroller of county accounts, whose duties included the accounts of some officers previously exempted.

Valuable results have come from this supervision of county accounts. Irresponsible methods disclosed in the seventies have been corrected, and important reforms have been introduced. Governor Bates two years ago testified to the good that has been devised from the uniform system of accounting established in the counties,[1] and indorsed a similar supervision over municipal accounts.

One of the youngest states in the Far West was the next to follow up these partial measures of the old Puritan commonwealth, by establishing a comprehensive system of state supervision over local accounts. The constitution of Wyoming, adopted in 1890, provided for the office of state examiner to examine the accounts of certain state officers, clerks of courts, county treasurers, and such other duties as the legislature might prescribe. This was followed by the enactment of statutes which before long placed under the supervision of this officer the accounts of every public officer in the state handling public funds; authorized him to establish a uniform system of bookkeeping by the state and local officials, and to examine their accounts; and made provisions for further action in cases of defalcation discovered through his examinations. The same officer has also supervision over banks and other private financial institutions.

The examination of public accounts is technical and embraces the checking of every item whether great or small, the subsequent footing of the cash accounts, and finally their summation. Every account paid is closely examined, the nature of the expense ascertained, the legality of the bill inquired into, and the amount is finally checked to the stub of the warrant issued, and also entered in the proper column of the expense register. Whether or not the officer conducted the affairs of his office in conformity with the statute is also made a subject of inquiry.

The examination made, a written report setting forth the results, accompanied with criticisms, requirements, and recommendations, is prepared and filed with

[1] R. H. Whitten, "Administration in Massachusetts," pp. 149–151 (*Columbia University Studies in Political Science*, Vol. VIII). Annual message of Governor Bates, January 8, 1903.

the governor and a copy thereof filed with the officer or officers whose accounts were the subject of investigation. Should it appear that there had been violations of law in the conduct of any office, the examiner must report thereon, and he has authority to enforce his rulings. In case of defalcation or embezzlement his findings are absolute, until reversed by the district or other court having jurisdiction.

In case of the default of any treasurer and the inability of such officer to replace funds illegally used within the time designated by the examiner, the examiner shall at once assume charge and in all respects he becomes the legally constituted treasurer of the state, county, municipality, or school district, as the case may be.

Another important feature is the meeting of the examiner with the constituted boards authorized to make the annual tax levy. At such time the expense budget for the ensuing year is carefully canvassed and reductions made wherever possible. This paves the way for a reduced levy of taxes, and frequently the total levy may be reduced from one fourth to one mill or more, as compared with the previous year.[1]

Striking evidence may be adduced of the benefits resulting from this system of supervision in Wyoming. In 1892 the expenditures of the twelve counties in the state were $412,000, while only two counties were on an approximate cash basis, the others generally allowing their expenses to exceed their revenues and issuing illegal warrants to pay bills. In 1899, with thirteen counties, the total expenditures had been reduced to $295,000, and every county was on a cash basis, with a surplus at the end of the year.[2] Several governors of the state have specially commended the work of the state examiner in their messages to the state legislature.[3]

Other states near Wyoming soon followed its example to some extent. Montana and North Dakota have each created the office of state examiner, with power to examine books and prescribe accounting methods in county offices, as well as in state institutions. South Dakota, Nebraska, and Kansas have provided a less effective supervision, — in the two first named through the state auditor; in the last named through a state accountant.[4] More recently (in 1903) Nevada has established a more intensive system of control. A state board of revenue must approve the debts of local governments, prescribe the forms for financial reports to the state comptroller, and employ an examiner to inspect the accounts and records.[5] And in the same year the extreme southern state of Florida created the office of state auditor, whose chief duty is to prescribe the form of county accounts and see by inspection that they are properly kept.[6]

[1] H. B. Henderson, Report of Conference on Good City Government, National Municipal League, 1900, pp. 251–252.
[2] Ibid. p. 251.
[3] Governor William A. Richards in 1899, and D. F. Richards in 1903.
[4] Nebraska, Laws of 1893, Chapter 15; Kansas, Laws of 1895, Chapter 247.
[5] Laws of 1903, Chapters 78, 123.
[6] Laws of 1903, Chapters 14, 71.

In the state of New York something has been accomplished in the same direction. Beginning in 1892, the state comptroller has been given power to audit certain accounts of county treasurers, including the court and trust funds and the accounts for the inheritance tax; while the state excise commissioner has similar authority over the accounts for the liquor tax. The introduction of the comptroller's audit disclosed inextricable confusion in the various accounts of county treasurers, and that within a few years before there had been defalcations or shortages in thirty-three of the sixty counties in the state. A uniform system of bookkeeping has now been introduced for these special funds, which, with the regular audit, discovers and often prevents deficits and defalcations.[1]

In 1903 a statute was enacted requiring all cities in the state with less than 250,000 population to make uniform financial reports to the Secretary of State. But as no provision was made for uniformity of accounts or for an examination or audit of the books of the city officers, nothing has as yet been accomplished under this provision.

Until two years ago this movement towards state supervision of local accounts was confined to the less important states and to such partial measures in the larger states as have been noted. But in 1902 the state of Ohio enacted the most important law on the subject yet adopted. This provided for a uniform system of accounting, auditing, and reporting for every public office in that state, under the supervision of a newly established bureau of inspection in the office of the auditor of state. The act requires separate accounts for every appropriation or fund, and for every department, institution, public improvement, or public-service industry; provides for full financial reports to the auditor of state; and authorizes annual examinations of the finances of all public offices, with power to the examiners to subpœna witnesses and examine them under oath.

To carry out the provisions of the act three deputies and a clerk were appointed by the auditor of state, all of whom were former county auditors and experienced in local methods. These, with the assistance of expert accountants who had given special attention to municipal accounting, and after a thorough investigation of existing practices, prepared complete systems of accounting which have been installed throughout the state in the offices of county auditors and treasurers, city auditors and treasurers, village clerks and treasurers, school-district clerks and treasurers, and township clerks and treasurers. The first examinations of the accounts are now being made by the examiners of the bureau, and from their reports comparative statistics of local finances covering the whole state of Ohio will be published.

This brief description of these various measures must bring into clearer light their significance and the tendency which they illustrate. No one considered by itself, nor even all that has been done in any single state,

[1] Fairlie, "Centralization of Administration in New York State," pp. 185–186 (*Columbia University Studies in Political Science*, Vol. IX).

may seem of very large importance; but when the detached and apparently disconnected pieces have been brought together, it must be evident that in the aggregate they indicate a distinct movement towards state supervision of local finance. We may therefore inquire into the rationale of such a movement, and consider to what extent it should be encouraged.

In some respects the movement may seem in conflict with general principles which are still declared to be fundamental in our American system of government. It must be admitted at least that it is not consistent with the most extreme demands for local autonomy, and that state control is not so clearly justified in this field by a general state interest as is the case in state supervision of health administration, schools, or the local management of state finances.

If, however, instead of unreasoned ideas, we apply the principles of such political thinkers as John Stuart Mill and Henry Sidgwick, it will be seen that this movement is in entire accord with a rational political philosophy. These writers recognize fully the advantages of locally elected authorities for matters of local interest, as well as for the sake of the political education of the people; but they also point out the advantages of central supervision, not only where the interests of the larger governmental units are directly concerned, but also because of the more complete information and the larger degree of technical efficiency which the higher government can demand.[1]

Both of these latter factors support state supervision in the two branches of local finance that have been noted. The assessment of property with any approach to equality of treatment calls for a high degree of expert skill and the comparison of conditions over a wide area. A uniform system of accounting is essential for accurate information on public expenditures, and for the comparison of outlay with returns in the many branches of local administration. And state control over the accounts of local public authorities is certainly as important as the control that has been established in most states over the accounts of private corporations, such as railroads, banks, and insurance companies. It may also be noted that the state supervision established over local finance does not restrict local management where local control is essential, — in determining the amount and distribution of expenditures.

In conclusion, attention may be called to another branch of local finance where a system of state administrative supervision is urgently needed, — over the loans and debts of local authorities. The need for some control here is already recognized in the constitutional and statutory-debt limits established. But these arbitrary limits do not and cannot adjust themselves to the varying needs and conditions of different local communities. There is a great difference between a debt incurred for water works, which will be met by the revenue from the undertaking, and a debt for parks, which must be paid from general taxation, and a debt for street

[1] Mill, Representative Government, chap. xv. Sidgwick, Elements of Politics, chap. xxv.

paving that may be worn out in ten years. To decide whether additional debt may be safely incurred, can be determined wisely only after a careful examination of a complex financial situation, involving a study not merely of the aggregate amount of existing debt, but also of the provisions for meeting this debt and of the resources of the local government concerned. Such an examination requires expert technical knowledge, which is entirely absent from the present crude legislative limitations, and can only be supplied by a permanent administrative authority.

TAXATION OF THE PROPERTY OF RAILWAY CORPORATIONS[1]

By Governor La Follette

In the contest for equal and just taxation prior to 1899 it was well understood that the public-service corporations were bearing much less than a fair share of the tax burden. The legislature of that year assembled under the strongest obligations to the people of this state to equalize taxation. A movement was made toward the discharge of that obligation by passing through the assembly a bill increasing the license fee upon the gross earnings of the railroads from 4 to 5 per cent. While this would have fallen far short of the amount which should be borne by the railroad companies, it would have proven a very substantial increase. This bill was beaten in the Senate. It was at this period in the contest that the bill was brought forward creating the Tax Commission. The bill received the support of the opponents as well as advocates of more equal taxation, including lobby agents and railway-company attorneys. To them it presented the relief of postponement.

The passage of the measure was urged as a great public necessity. It was maintained that the members of the legislature could not give the subject of taxation the time and attention which its importance required; that it demanded men trained for the task, clothed with power and authority to prosecute the fullest investigation, enabling them to place before the legislature the ripe work of their research for its guidance and direction.

While it was then well understood that the increase in railroad taxation sought to be enacted at that session was much less than the amount fairly due from the companies, nevertheless the creation of the commission was accepted in good faith upon the promise made by the representatives of the railroad companies that the results of the work of the commission would be accepted and acquiesced in. Able, conscientious, and conservative men were appointed upon the Tax Commission, and prosecuted their investigation for a period of nearly two years, making their first report to the legislature which assembled January 9, 1901. That

[1] From a message to the Wisconsin legislature, January, 1903.

legislature had been chosen by the people of Wisconsin with the plain understanding that they would receive the report of the Tax Commission and carry out its recommendations equalizing the burdens of taxation.

The report presented by that commission exhibited original, intelligent research, able reasoning, and well-considered conclusions. It left nothing to doubt or conjecture, but plainly pointed the way for the legislature. It made it clear that if the railroads were taxed at their actual value at the same rate as other taxable property of the state, they would pay a million dollars a year more than they were then paying.

The creation of the Tax Commission was a deliberate avowal on the part of the legislators of their inability to deal with the complex subject of taxation without assistance. There was well-grounded reason for this. Putting aside all question of the intricate character of the subject, the brief period covering the legislative session, the confusion arising from the multiplicity of legislative duties, the many interruptions and distractions to which they are inevitably subjected, leave little time for that research and deliberation essential to wise and sound legislative action in an involved matter of such scope as taxation; hence it was the more remarkable that legislators, some of whom had not previously given the subject any study whatever, and nearly all of whom had examined it but superficially, should feel prepared to assume the responsibility of rejecting the conclusions of the Tax Commission, arrived at after long, patient, and arduous investigation.

Such was, however, the case. After weeks and months of delay, during which lobby agents and representatives of the railway companies were busy, the recommendations of the Tax Commission were rejected and the bills prepared by them and submitted to the legislature, in accordance with law, were defeated in the assembly, action upon the same having been delayed in the Senate until after the measures proposed by the Tax Commission had been beaten in the assembly.

Again the question of equalizing the burdens of taxation has been submitted to the people of Wisconsin, and your honorable body assembles with obligations renewed for the third time, and with responsibilities increased, finally to accord justice to the taxpayers of this commonwealth.

Upon the executive, under the constitution and laws, rests the responsibility of presenting to you such reasons as he may offer why legislation should be enacted. This he may do from time to time during your deliberations. Further than this he is powerless, excepting the legislature, acting upon those suggestions, or upon their own initiative, pass the measures and present them for his approval. After proposing or recommending the enactment of the measure to the legislature, the responsibility of the executive, as well as his authority, ceases. Unless action be taken by the legislature the measure fails.

You will soon be in possession of the report of the Tax Commission. It represents nearly four years of labor by the able members of that body

without bias or prejudice, prompted solely by the desire conscientiously to discharge high official obligation. I am confident you will place that reliance upon the work of this commission that the public has already sealed with its approval. If the inauguration of the investigation of this subject by the commission was in good faith, then in good faith those for whose guidance its work was planned are bound to give heed to its findings and recommendations.

In determining that we should abandon the license-fee system of railroad taxation in Wisconsin, the commission will simply reaffirm the declaration made two years ago, that the license-fee system would be "superseded by a more scientific method" of railway taxation.

Of the license-fee system upon gross earnings a high authority says:

> The administration of such taxes is comparatively simple and certain, but they have no other justification. They are unequal and arbitrary, the rate imposed being necessarily fixed by guesswork or intrigue. In the case of public-service corporations there are but two bases of taxation that can be plausibly defended, — net income and actual value. When both these are abandoned, chaos results. These arbitrary taxes, though unequal as between corporations of the same class, have usually been favored by corporate interests because of their definiteness and because the amount paid is usually much below their proportionate share of the burden of government as measured by net income or the actual value of their property.

While the administration or collection of such taxes is comparatively simple and certain, it is not less certain that the state is entirely at the mercy of the corporation respecting the amount of gross earnings reported, upon which the license fee is computed, and it may be safely assumed that the corporation never wrongs itself in making such report.

The license-fee system, if fairly adjusted as between railroads and other taxable property of the state to-day upon an agreed percentage, would furnish no assurance of a fair division of tax burden a year hence. Conditions arise from time to time in the commonwealth requiring an increase in the rate upon taxable property. At such times property taxed under the ad valorem system must bear all of the increased burden, while the percentage upon which the license fee is based remains the same. No valid reason can be assigned why railroad property, remunerative as it is, — its value increasing with the development and growth of the state, — should not bear its relative proportion of whatever befalls other property by reason of increases in taxation to meet emergencies and exigencies that come in the ordinary course of human events.

Legislative appropriations from year to year are increased as the expansion and development of the state creates proper and unanswerable demands therefor. Public buildings for properly housing and caring for the state's dependent, its criminal classes, for its schools, and courts, and university, must be erected, renewed, and enlarged repeatedly. It is but just that railroad property should bear its share of such appropriations.

The railroad companies under the license-fee system have no interest and no concern respecting the money appropriated by the legislature. It is a fact within the knowledge of every legislator of experience that the influence of the railroad lobby is often employed to pass legislation resulting in an increase of general taxes in exchange for the votes of those interested in such appropriations to defeat other legislation obnoxious to the railroads. Doubtless millions of dollars have been unnecessarily expended through such combinations. This could not have occurred if the railroads had been taxed under the ad valorem system and possessed the same general interest that other taxpayers have in keeping appropriations within reasonable limits.

But in addition to all of the other objections to the license-fee system, when it is remembered that they are permitted in effect to fix the amount of the taxes which they will pay, without any practical check or supervision by the state, no excuse or justification can be given for continuing a plan of taxation so unjust to other taxpayers of the state. Investigations which have been conducted by the Interstate Commerce Commission in the courts leave no room to doubt that millions of dollars are paid back to shippers in rebates, under arrangements deemed advantageous, directly or indirectly, to both the railroads and the favored shippers. That these rebates in Wisconsin alone amount to vast sums of money annually is beyond dispute. Not one dollar of this sum rebated to shippers, and properly a part of the gross earnings of railroad companies, is reported to the state. That a valid claim exists against the railroad companies, for the amounts so withheld from their reported earnings, does not admit of question, whatever difficulties lie in the way of making proof of the same. I do not believe that you will fail to follow the recommendations of the Tax Commission and abandon a system of taxation so obnoxious to every principle of fairness to those who must maintain government.

The taxation of railroad property, as of all other property, upon its actual value, can work no injustice to any one. The effort, by those interested in preventing the adoption of the ad valorem system for railroads, to make it appear that the value of railroad property cannot be ascertained, is not entitled to serious consideration. That which has a sufficient physical existence to stand as security for the loan of vast sums of money; that which is represented in the markets of the world as among the most readily salable property; that which is productive in its earning capacity of an enormous annual income, has all of the essentials in certainty and definiteness that property requires for the purposes of taxation.

In ascertaining the value of railroad property the average value of its bonds and stocks in the market would be an element to be taken into consideration. If it were taken as the sole basis for valuation, the railroad companies ought not to be heard to complain of its unfairness to them, because they levy such a tax upon the public in the form of

transportation rates as will produce a certain income computed upon the market value of their stocks and bonds, in addition to exacting enough more to maintain the roadbed, rolling stock, depots, and grounds, in good condition, and provide an increasing surplus; but the average value of the bonds and stocks should not be taken as the sole method of ascertaining the value of railroad properties for taxation. The State Board of Assessment would appraise the actual value of the tangible physical property of railways. In addition to this, the value of the franchise, into which there enters many elements embraced in the corporate power and privileges with which railroads are clothed, must be reckoned. Supplementing all these, the earning capacity of the property would constitute a most important factor.

As stated by the Supreme Court of the United States upon this subject, "Business men buy and pay for that which is of value in its power to produce income." The earning power of corporate property, determined under the rigid system of accounting which admits of no juggling of the figures in operating, equipment, construction, and like elements of the accounting system, will equip a board to ascertain the net income which, capitalized at the average interest rate, would enable those charged with official responsibility to arrive at a just determination of the taxes which the railroads should pay.

Into the formation of the judgment of every assessor in fixing property values there enters many elements. The location, the quality, the appearance, the relation of the property to adjoining properties, the earning capacity, the expense of maintenance and operation, are some of the complex elements which enter into the formation of the assessor's judgment of the value of every piece of property assessed against individual taxpayers. So with the State Board of Assessment, respecting the property of railroads and other public-service corporations, there are many elements to be considered, all of which will be given due weight by the board charged with the responsibility of doing justice between these corporations and individual taxpayers to the state.

Acting along these lines, after a protracted contest, the state of Michigan adopted the ad valorem system of taxing railroads and other public-service corporations, established a state board of assessment, ascertained the value of railroad property, applied to it the same rule of taxation which is applied to the property of individuals, resulting in an increase in the taxes on railroad property of that state of thirteen hundred and sixty-six thousand, three hundred twenty-four dollars and thirty-eight cents ($1,366,324.38).

The taxpayers of this commonwealth were very patient while investigation was being prosecuted. They have shown great forbearance with delays and postponements heretofore. They have sustained wrong and injury which can never be repaired. They have carried the burden of others in addition to their own, for which they will never be compensated.

They have paid out of their savings the taxes of the public-service corporations for many years. It is their due, it is due to the state, that these wrongs should end here and now. The past cannot be recalled. The wrongs inflicted cannot be repaired, but there is lodged with this legislature the full authority, and upon it rests the binding obligation, to deal justly with these corporations and with the people. This duty is not one which may be shirked or evaded or postponed.

Efforts may be further continued to obstruct the course of justice. These failing, as a last resort efforts will be made to compromise. There has been given into our hands a trust to discharge. Difference of opinion may arise in the performance of public duty upon questions of policy. This is not a question of policy. The railroad companies of this state owe the state more than a million dollars a year. For many years, because of the postponement or defeat of legislation requiring them to pay their proportionate share of the taxes, the other taxpayers of Wisconsin have paid for them a million dollars annually. The case has been tried, the hearing has been full. Judgment has been given again and again. Pledges have been made by political parties, and repeated by candidates for office, over and over again. The question is not an open one. There is no opportunity for misunderstanding. There is no room for speculation. The truth is ascertained. The truth is known. It is lodged in the public mind to stay. The people want a million dollars a year, because that is the sum owing. They are not to be wheedled by any soft phrases about "conservatism." There is nothing to compromise. Equal and just taxation is a fundamental principle of republican government. The amount due as taxes from railroads and other public-service corporations should be paid, and paid in full, and I am confident the legislation to secure that payment will be promptly enacted.

I recommend that the bill formulated by the Tax Commission in accordance with their report, pursuant to the law creating that body, and presented by them to the legislature, be passed promptly; and that there may be no uncertainty I now say that a measure creating a state board of assessment to determine the value of railroad property, and applying to railroad companies and other public-service corporations the same rate of taxation which other taxable property pays in this state, will be promptly approved by the executive, if given the opportunity.

That the Tax Commission should constitute a board of assessment, in whole or in part, I have no hesitation in recommending. The terms of the members of the board should however be so changed as to expire at intervals of two or more years, to the end that there should be at all times men upon the board trained in its work. The term of service should be from six to nine years, which will enable the commission to acquire such experience as to become more and more proficient in their duties of valuing corporate property and mastering all the complications of corporate accounting. But in determining the value of railroad property and the

property of other public-service corporations, it will be found necessary to place at the command of the board the expert knowledge of a competent civil engineer and a competent accountant. Men skilled in these lines of work command good pay. The railroad companies employ the best talent available in each of these departments. The state will be placed at a great disadvantage in assessing and collecting taxes from public-service corporations unless it so equips its Board of Assessment and Taxation as to meet these corporations on equal terms with equal talent.

There are two methods, either of which would equip the board for this important work. They might be authorized to employ such experts in their discretion and pay them a reasonable salary. There would, however, always be the possibility of the legislature failing to provide an appropriation sufficiently adequate to secure this assistance for the board.

This important work might be crippled under the plea of economy, which the corporations would adroitly urge through their many agencies. This danger could be obviated by increasing the membership of the commission or Board of Assessment, adding thereto a civil engineer and an expert accountant. In undertaking and carrying forward this important work there would be found constant employment for such a commission. The increase in expense, arising from the enlargement of the board by two additional members, would be trifling indeed compared with the increased revenues of the state, resulting from the proportionate taxation of the property of these great corporations at full value. The Board of State Tax Commissioners, acting as the State Board of Assessment for appraising and assessing the property of public-service corporations, is certain to become the most important body in our entire tax system. We are therefore bound to exercise the greatest care in establishing it upon a safe and permanent foundation. While in this, as in all things pertaining to the public service, extravagance in expenditure must not be permitted, yet there can be no more certain method of squandering the public money than in mistaking cheapness in the ability of public servants for economy in the public service.

In establishing a state tax commission charged with the responsibility of exacting from these corporations the immense sums of money which they have successfully and wrongfully withheld from the state, we are imposing upon them a task hedged about and complicated with difficulties of every conceivable kind and nature. Their course will be obstructed, their work will be subjected to the most searching analysis, it will be tested in courts, and the state will be shortsighted and wasteful of both time and money, if it fails to afford such commission the very best equipment possible for the great undertaking committed to it.

Wisconsin can profit by the experience of other states, some of which assess the property of corporations through a commission or board composed of state officers. Such boards or commissions bring to their duties, as a rule, no special training or aptness for the work, and can give but a

small portion of their time, since their regular duties as state officers must take precedence; consequently they are but ill prepared to confront the able accountants and engineering experts employed by the corporations.

There is, however, one merit in the system of assessing corporate property through commissions of state boards composed of state officers, and that is, they are directly responsible to the people and must, with each recurring election, defend their acts as commissioners before the voters.

In other states the boards are appointed directly by the executive with the concurrence of the higher branch of the legislature. Where the terms of service are long, the commissioners or members of the Board of Assessment become expert in their duties, even though they had little technical knowledge when appointed; and this method is preferable, but it is open to the objection that the corporations may exert an influence in the appointments and confirmation of them from time to time, and thus influence the appraisal of their own property.

It has been suggested by an eminent writer on this subject that:

> The safest plan for organizing a state commission is a combination of ex officio and appointive officers with equal voting powers. Three appointive members with terms of six or nine years, one of whom is appointed from two to three years, will have a sufficient term of office to become expert in these duties, and the appointments will be so spread out that the character of the entire board cannot be changed at a single election of governor.
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> Two ex officio members, the most important officials of the state, namely the governor and auditor of state (or attorney-general), should be associated with these appointive members. These officers are responsible to the voters. The appointed members should give their entire time to the work of appraisal, but no assessment should be valid until passed upon by the entire board of five members.
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> A board constituted in this way would combine the elements of expertness and public responsibility. The appointed members and the ex officio members would be a check upon each other. In the ups and downs of politics, when popular interest lags or is occupied with other great questions, at which time the ever-watchful corporations may be expected to slip their tools on to the board, the permanent and balanced character of the board would prevent them from getting control until such time as the attention of the people is again aroused. At the same time the board as thus constituted would deal fairly and honestly with all corporations, for their investors also are a part of the people, and they will be represented before the board by their tax experts.

While the establishment of a board of assessment for the purposes of assessing the property of public-service corporations upon the ad valorem basis will be resisted by the corporations, yet when adopted by the legislature their power and influence will be exerted to secure from time to time the appointment of such men to the board as will be most favorable to their interests. This it is the part of wisdom for us to understand now, and provide against in so far as possible. Indeed, the representative of one of the leading public-service corporations went somewhat farther than

this during the last legislative session when he declared that: "The ad valorem system is one which is more liable to be affected by the weaknesses and evil elements of human nature, and is therefore open to more criticism, and more justly, than the license-fee system."

The question of railway taxation is a practical one, and it is expected that as public officials we will deal with it in a practical way. As men of experience, some of you men experienced in legislation, you will understand, as the public likewise understands, the opposition which has been made by the railroad companies to any increase in their taxes. It is a matter of common knowledge among those who have encountered the railroad lobby that this opposition was so determined as to announce the declared purpose of the railway companies to increase their freight rates enough to offset any increase in taxation. The ease with which this menace might be enforced can very readily be seen. An increase in the fraction of a per cent in freight rates, or a slight readjustment of the classifications, would enable railroads to collect from their patrons in Wisconsin more than enough to balance any increase in their taxes.

Indeed, since legislation has been pending in this state to require railroads to pay their proportionate share of taxation, freight rates for Wisconsin have been increased, indicating a forehanded determination to be prepared against legislation to equalize taxation.

It becomes apparent at once that legislation compelling the railroads and other public-service corporations to pay their proportionate share of the taxes will fail utterly in its object, unless it be supplemented with legislation protecting the public against increased transportation charges.

TENDENCIES IN RAILWAY TAXATION[1]

By Henry C. Adams

In searching for the trend of railway taxation it would be an error to assume the existence of a separate and independent system of corporate taxes. This assumption has been frequently made by writers upon American finance, but in so doing they fail to distinguish between the underlying principles of a system of taxation, on the one hand, and the machinery for administering that system, on the other. So far as methods of assessment and collection are concerned, it is true that railway corporations are placed in a class by themselves, but it is not true, speaking generally, that the theory of public contributions applied to them differs from the theory which is applied to other classes of property. That system of taxation, known as the general-property tax, is as strong to-day

[1] A paper read before a joint meeting of the American Political Science Association and the American Economic Association at their annual meeting, Chicago University, December 30, 1904. Reprinted by permission.

as it ever was in the history of our country; indeed it is stronger, if we are to judge from the changes that have taken place in the laws of the states during the past twelve years.

Distinction in Taxation between Railway and Other Property

A glance at the laws of railway taxation in the several states and territories gives ample support to the claim that these laws fail to introduce any new principle into the established system of local taxation. Including the District of Columbia, and excluding Alaska from the list, local government in the United States is represented by fifty states and territories. Of this number only two, Rhode Island and the District of Columbia, make no distinction in the matter of taxation between railway property and other property; that is to say, these political divisions fail to provide special methods even for the assessment and collection of railway taxes.

Thirty-nine States make Railway Property, Personal and Real, the Basis of Taxation

There next comes a list of thirty-nine states which make the general property of the railways, including both personal and real, the basis of taxation, but which provide machinery for assessment of railway property different from that employed in the assessment of general property. The character of this administrative machinery is of no importance as bearing upon the question under consideration. Nor does the fact that some of these states make an assignment of railway assessments to the minor civil divisions through which the railway runs, while others distribute the money collected, and still others keep this money for state expenditures, bear upon the problem in hand. The important fact is that the system of local taxation in these thirty-nine states expects railway property to pay for the support of government an amount in proportion to the value of the property, the same as in the case of general property. These thirty-nine states, like the two already mentioned, making forty-one in all, are properly included within the jurisdiction of the general-property tax.

With the Exception of Three States, Railways are taxed according to Value

There are five states — Delaware, Massachusetts, New York, Pennsylvania, and Kentucky — which tax railway property according to its value, but assess the tax to the value of stocks and bonds rather than to the value of real and personal property. In all cases, with the exception of Connecticut, this tax upon stocks and bonds is supplemented by other forms of taxation. It is the ad valorem and not the specific tax that gives character to their taxing systems. It thus appears that forty-seven

out of the fifty states and territories aim to tax railways in proportion to their value. The remaining states — Maine, Maryland, and Minnesota — have adopted a system of specific taxes, making gross earnings the measure of the duty of railways to pay for the support of government. Two states — Vermont and South Dakota — give the railways the choice between paying upon an ad valorem or a specific basis. The states of Ohio and Texas also tax railways upon the basis of gross earnings, but make this as a supplementary or additional contribution. Five states adopt the essentially pernicious method of supporting their railroad commission by means of a special tax on earnings. Other minor differences might be mentioned, but they would not affect the conclusion that, with the exception of Maine, Maryland, and Minnesota, railways are taxed according to the value of their property, and that both common-law provisions and constitutional rules relative to equity and justice in taxation require that they pay a rate equal to the rate of other property upon their cash or par assessment.

The Unit Rule is not a New Principle

It has sometimes been claimed that the application of the unit rule in the valuation of railway property, a rule which has received the approval of the courts, amounts to the recognition of a new principle of taxation. With this opinion I cannot agree. The unit rule is nothing more than the application of an old rule of law that property must be valued according to the use to which it is put. It is but the recognition of the fact that the commercial value of railway property depends upon its continuity from county to county and from state to state. It is the logical result of the expansion of commercial properties beyond the limits of local taxing jurisdiction. The unit rule of assessment is in perfect harmony with the assumption that value is commercially homogeneous, and implies no criticism upon the underlying theory of the general property tax. It, like the laws of the states passed in review, pertains to the application of the general property tax to interstate properties, and does not suggest, at least in any direct manner, that the value of a railway may differ both socially and industrially from the value of a factory, or that the value crystallized in the property of a railway may itself be subject to analysis and classification according to its character or the source from which it arises.

Not only does the recognition of the unit rule of valuation in itself imply the development of no new principle in the taxation of corporations, but its assertion by the courts permits the application of the general-property tax to properties which have previously escaped their equitable share of public burdens. This certainly is true of the decisions in the Ohio express cases, which enable the state of Ohio to collect taxes upon a valuation in excess of the value of the physical property used by the express companies within the state. The laws by which sleeping-car

companies and other persons or corporations owning rolling stocks are taxed, furnish many illustrations of an effort on the part of legislators to discover some other method of levying contributions than upon the basis of valuation. This was necessary before the deduction of the unit rule. Since the decision in the Ohio express cases, however, legislators are provided a means by which such persons or corporations may be taxed upon a value in excess of the value represented by their physical property within the state; and I think we may confidently expect a revision of the laws for taxing express companies, sleeping-car companies, and other companies owning transportation facilities, which will substitute the ad valorem for the specific rule in taxation. Georgia has already revised her method of taxing sleeping-car companies. From whatever point of view we look at the matter, the unit rule of valuation, so far from implying the disintegration of the general-property tax as applied to corporations, has given that scheme of taxation a broader field for its application.

Recognition of a Franchise Value

The courts have however taken one step which may prove to be a point of departure for the development of new principles in the taxation of railway corporations. I refer to their recognition of a franchise value. It is not necessary to go into the details of these cases nor to discuss the propriety of the rule accepted for the measurement of franchise values. The significant point is that the courts have taken judicial cognizance of a value in excess of what may be termed the inventory value of the physical properties. This being the case, the question at once arises as to the source of this excess or surplus value, and also its social and industrial quality; and, should an analysis of this value prove it to be in any way peculiar, the further question arises, whether the principles of equity and justice, which are acknowledged to lie at the basis of taxation, may not require the taxation of this value in a peculiar manner. To answer this question calls for an analysis of what for convenience may be termed the surplus value inherent in the property of a prosperous railway, and it is to this analysis that I now invite your attention.

Surplus Value the Product of Organization

Speaking generally, the value of the intangible, immaterial, or non-physical element of an industry is the product of organization, a productive principle recognized by Adam Smith, the importance of which has grown with each step in the development of industry. Such an observation, however, is of but slight importance, for commercial organization is itself of many sorts and followed by various results. Our analysis will be more fruitful if we substitute for so glittering a generality an enumeration of some of the more important elements to be found in surplus value as it inheres in railway properties.

Surplus Value — the Formal Value of the Franchise

1. This value covers, in the first place, the value of the franchise, that is to say, the value of the right to be and to act as a corporation. An assertion of a franchise value as a distinct form of value, however, is submitted as a concession to legal lore rather than because it is believed to be of very much importance. It is undoubtedly true that a franchise carried with it an independent value when the right to be and to act as a corporation was an exclusive privilege. At present, however, general corporation laws have destroyed whatever value pertained to a franchise on account of its exclusive character. If there be surplus value, it must be found in the nature of the industry in question, or in the relation which that industry bears to the principle of competition, and not in the fact that a particular body of men are at liberty to exist as a corporation. The surplus value which we are now endeavoring to explain is something more than the formal value of the franchise.

Surplus Value — a Value in Excess of Inventory Value

2. Holding in mind the business of transportation by rail, this value includes, in the second place, the possession of traffic not exposed to competition, as, for example, local traffic. There are, of course, commercial limitations to the value accruing to a railway corporation from this source. For example, the rates from noncompetitive business are more or less influenced by the rates for competitive business. The curtailment of demand through excessive charges, also, as well as all those considerations which find expression in the law of monopoly prices, act as commercial restraints in the adjustment of local railway tariffs. But, notwithstanding all that may be said in this vein, it yet remains true that commercial considerations offer no guarantee of just and reasonable rates when judged by ordinary business standards; and the margin of surplus earnings thus rendered possible becomes the basis of a surplus value, that is to say, a value in excess of the inventory value of physical elements.

Surplus Value — created by Amalgamations and Consolidations

3. The nonphysical value of the railway includes, further, the value which arises from the possession of traffic held by established connections. The fortunes that have been made in the railway business during the past fifty years have resulted largely from the organization of independent companies into great railway systems. The important point for this analysis, however, is that the amalgamation of connecting lines, as well as the consolidation of competing lines, gives to each member of the operating system thus created a class of traffic which it might not otherwise be able to hold, and consequently confers upon each member of the

system a value which it might not otherwise possess; and when it is remembered that the rates at which this traffic is moved are not exposed to the competition which would exist were it not for the organization of railway properties into systems, it is evident that this element of value is likely to be of considerable importance. From the point of view of the influence of competition upon the earnings of railway corporations, the difference between the so-called competitive and noncompetitive traffic is less than commonly supposed. Whether traffic be local or through, competition is no guarantee that it will be carried for what it costs to render the service.

Surplus Value — created by Density of Traffic

4. The intangible value includes, in the fourth place, the benefit of economies made possible by the increased density of traffic. This statement rests upon what is universally recognized as the fundamental business principle of railway transportation. It means that the growth of population and the consequent increase of traffic which results from the growth forces a value into the treasuries of railway corporations which cannot be credited to the superior ability of those by whom railways are administered. Were this business exposed to the influence of competition, the value in question would be dissipated to the public through a reduction in the price of service. For many reasons, however, this is not possible in the case of the business of transportation, and the value resulting from economies rendered possible by the increase in traffic comes into the possession of the corporation rendering the service.

Surplus Value — created by Organization and Vitality

5. Lastly, the intangible value of a railway corporation includes a value arising on account of the organization and vitality of the industry which renders the service. This value, consequently, is in the nature of an unearned increment to the corporation. It may be said that all industries are interdependent, and that every business depends for its prosperity upon the prosperity of those who are its customers. This is undoubtedly true, but it is equally true that, unless all industries are equally exposed to competition, or upon the same basis so far as concerns their ability to avail themselves of the advantages of monopoly, some will be able to maintain while others will be forced to give up the value that accrues on account of the widespread development of industrial technique. The significance of this observation in the analysis of surplus value becomes evident when it is conceded as an answer to the claim that the railways have created the wealth of the world and that their compensation cannot therefore be too highly appraised. It is a mistaken analysis that overlooks the close interdependence of all the agents of industrial prosperity.

Surplus Monopoly Value a Social Product

If the above analysis of the origin and nature of surplus value, as it appears in the case of a prosperous railway corporation, be correct, it is evident that this value exists because it fails to be diffused to the public through the agency of commercial competition. Were competition able to keep the price of the service of transportation in the case of each and every railway down to the cost of the service rendered, or were it good policy for the government to define a reasonable rate as a rate which coincides with the cost of service, including normal profit, no such value as that under consideration could exist. The capitalization of railways, and consequently the assessment of railway property for the purpose of taxation, would tend to be the cost of reproducing the plant, as in the case of manufacturing properties, whose balance sheets are continuously exposed to the adjustments of competition. This means that the surplus value of a railway corporation is monopolistic in its origin in the same sense, though not for the same reason, that the capitalization of the rental value of real estate is monopolistic. It is a value contributed by the public to the corporation because of the imperative character of the public demand for transportation. It results from the fact that increased density of traffic, due to the increase in population and to the development of general commercial activities, provides the railways with an ever-increasing opportunity of availing themselves of the productive principle which lies in organization. The relative amount of this surplus value, which should be credited to railway managers on the one hand, for availing themselves of the opportunities of increased economies, and to the public whose industrial activities furnish these ever-broadening opportunities, is not here in question.

The Public a Joint Proprietor with Railway Corporations

The important fact is this, that a portion of the surplus value now enjoyed by railway corporations is a direct contribution from the public, and that competition is incapable of diffusing this value through a reduction of the price of the service. It is a socially produced value, and the logical application of the principle which lies at the bottom of the institution of private property, namely, that he who produces a thing should be its proprietor, will lead to the conclusion that the public is a joint proprietor with the railway corporations in the property which they control. This at least is the question which, as it appears to me, the attempt to secure a just system of taxation as between railway property and other property will force upon the consideration of the courts, and, should the courts acknowledge the accuracy of the analysis here suggested, and extend their definition of property to include a quasi-public property as they now acknowledge a quasi-public industry, a radical modification of

the system of taxation becomes imperative. The situation disclosed by this analysis is one for which the theory of the general-property tax makes no provision. That theory assumes value to be homogeneous, whereas the foregoing analysis makes it clear that this is not true. The tendency in railway taxation of which this paper speaks is not to be found in the statutes, but in the necessities of the situation. If my analysis be correct, it follows without question that the underlying principle of the financial system of the future will be the recognition of a joint proprietorship between the public and the corporations in all cases where surplus value proves to be a permanent feature. This, of course, assumes that a socialistic program will not be realized.

PROTECTION OF THE STATE TREASURY[1]

By Governor La Follette

Existing laws are wholly inadequate to insure the safe-keeping and integrity of the funds and securities of the state in the state treasury. These funds and securities at times amount to a number of millions of dollars and always are of great monetary value. There are now in its vaults approximately $1,222,750 in negotiable bonds, payable to bearer, held in trust for the common-school, normal-school, university, and agricultural-college funds, in addition to large sums in the banks of deposit for state funds located at different points throughout the state. Very early in the present year there will be on deposit, and under the control of the state treasurer, money and negotiable securities belonging to the state of the value approximately of $3,000,000. The moneys may all be withdrawn upon check signed by the state treasurer alone, and securities all be negotiated by his simple indorsement. It will be admitted by all that the unlimited power to dispose of the funds and securities of the state ought not to be lodged in a single individual or officer. A dishonest official, in the absence of a legal check or restraint upon him, might easily deplete the treasury and cripple the conduct of the public business. The legislature cannot act too swiftly in correcting these defects by the enactment of efficient laws applicable to the subject. To this end it is suggested that laws should be passed:

1st. Providing that no bond or other negotiable security now owned or held in trust, or which shall hereafter be owned or held in trust, by the state shall be transferred except by the joint indorsement of the state treasurer and Secretary of State.

2d. Providing that there shall be indorsed or stamped across the face of all bonds or other securities now or hereafter owned by the state, the following: "This bond (or other security, naming it) is the property of the state of Wisconsin and can only be transferred by the joint

[1] From governor's message of 1905.

indorsement of the state treasurer and Secretary of State," or other words of similar import; and likewise upon all bonds held by the state in trust or hereafter so held, indorsed with the words: "This bond (or other security, naming it) is held in trust by the state and can only be transferred by the joint indorsement of the state treasurer and Secretary of State," or other words of similar import.

3d. Providing that all bonds or other negotiable securities hereafter purchased or becoming the property of the state or coming into its possession by virtue of any trust shall, at the time of such purchase or of becoming the property of the state or of coming into the possession of the state by virtue of any trust, immediately be stamped by the state treasurer across their face with the designated words.

Provision might be made for weekly meetings of the board of deposit, and that such board should have the power to designate state deposits as being (*a*) banks of deposit, (*b*) checking or working banks.

4th. Providing that the board of deposits should be given authority to order the deposit of such sum as it may deem advisable and safe, not exceeding the limit now prescribed by law, and that thereupon such sum be forthwith deposited in the bank of deposit named.

5th. Providing that neither the whole nor any part of any deposit made in a state bank of deposit could be checked out or withdrawn except upon the order of the board of deposit.

6th. Providing that all moneys, drafts, or bills of exchange received into the state treasury shall on the day of their receipt be deposited to the credit of the state in some one of the working or checking banks of deposit. That all drafts or other bills of exchange upon their receipt in the state treasury shall immediately have indorsed or stamped across their face the words, "This draft (or other instrument, naming it) is the property of the state of Wisconsin and can only be transferred by the joint indorsement of the state treasurer and the Secretary of State."

7th. Providing that warrants on the state treasury be paid by drafts on some one of the working or checking banks, which drafts should be signed by the state treasurer or assistant state treasurer and countersigned by the Secretary of State or the assistant Secretary of State, and no money should be withdrawn from such working banks except upon drafts so signed and countersigned.

8th. Providing that the state treasurer at the close of business on Saturday of each week furnish each member of the board of deposits a statement showing the total amount of receipts and disbursements for the preceding week of each fund in the state treasury, and the balance on hand in each state fund and in each of the state banks of deposit at the close of the week's business.

9th. Providing that the state treasurer should be required on the first day of each month, and at such other times as the Secretary of State shall require, to exhibit to him for his examination a true account of the

receipts and disbursements of the treasurer for the preceding month; and providing further that it shall be the duty of the Secretary of State on the first day of each month, or as soon thereafter as practicable, to examine and audit the accounts of the state treasurer, state board of control, state board of university regents, and state board of normal school regents, and to report to the executive any deficiency or irregularity in such accounts.

A number of state officers and departments, acting in the line of prescribed duty, from time to time receive in the aggregate large sums of money for fees, and upon other accounts pursuant to law, and nearly if not all pay out various amounts for necessary expenses. The statutes now in force provide for no appropriate checking or report as to these receipts and disbursements. Some provision should be made correcting this defect. These accounts should be carefully examined and report made thereon at stated intervals. The examination and report ought to be made by an officer who is independent of the different officers and departments whose accounts are to be so examined and reported. It would seem that the commissioner of banking would be the proper officer to make the examination and to report the results thereof. It is therefore recommended that the commissioner of banking be required by law, once in three months, or oftener if required by the executive, to examine the accounts of each officer and state department receiving state moneys or making expenditures thereof, and also the accounts of the charitable and penal institutions of the state, the normal schools, and the state university, and immediately thereafter make full report thereof to the Secretary of State. It might be well to provide also that these accounts be so examined and reported upon for the biennial period just closed. The accounts of the commissioner of banking should also be examined and reported upon in the same manner, but by some officer or person other than himself. This work would necessarily entail upon the commissioner of banking the burden of a large amount of additional labor, and some provision ought to be made for the employment and compensation of the necessary help to do it promptly and efficiently.

VI

EDUCATION

EDUCATION AND LOCAL PATRIOTISM[1]

By G. W. Curtis

The distinction that we draw between primary and secondary, or academic, education does not indicate an essential difference; it does not mean that the state is interested in one and not in the other. It is a distinction of convenience only, to define what limits it may be wise to prescribe for the public provision of education. The state care of education is taken in the interest of the public welfare; and of the public welfare, and of the necessary provision for it, the state is itself the judge. The state of New York, for instance, does not restrict its provision for education to the primary school. It includes within its beneficent care and supervision the whole system of colleges, academies, and secondary schools, not indeed to the same degree as the primary schools, but for the same purpose, namely, the public welfare, and upon the same principle, namely, the duty of promoting it. The maxim imputed to Jefferson, — the best government is that which governs least, — like all such absolute generalizations, in order to be true must be interpreted intelligently. Applying to it his own principle of strict construction, it would sweep away both the public school and the post office, the twin columns of public intelligence upon which the fabric of popular government rests. Jefferson was a practical statesman just in the degree that he disregarded the absolutism of his own maxim. The latest, most thorough, and ablest of the historians of his administration, Mr. Henry Adams, with complete justice to Mr. Jefferson's qualities, shows how comprehensive was this disregard. Mr. Bancroft, who delighted to call himself a Jeffersonian, pointed out to me but a few years since that Mr. Jefferson in his last message to Congress, on the 8th of November, 1808, recommended, in view of a treasury surplus, that the revenue should not be reduced, but appropriated "to the improvement of roads, canals, rivers, education, and other foundations of prosperity and union." The voice is Jefferson's voice, but the hands are the hands of Hamilton.

It is because New York, in common with her sister states, holds with the old Dutch state of Zealand that "education is the foundation of

[1] From a speech delivered at Kingston, New York, 1891

the commonwealth," that, while providing munificently for the primary schools, she does not restrict her interpretation of education to the knowledge conveyed in those schools, but includes within its rightful significance, and to a certain degree, the secondary schools. It is with the same wise view that the legislature at its late session made an appropriation for the system of university extension, which is simply a scheme for bringing the college, so far as practicable, to citizens in every part of the state who are unable to go to the college. The colleges of the state, in concert with the university of the state, which is the official head of the system of higher education, unite with the authority and aid of the state in an organized system of lectures and examinations to extend higher education throughout the state. Such a system, indeed, does not abolish the public school nor supersede the college nor give to its students the advantage of college residence. But in every community in the state which desires the benefit it gives to the graduate of the public school who is already engaged in the active work of life an alluring incitement to devote his leisure hours to study; and thus, by opening more widely diffused opportunities of education, by bringing the good tidings of larger knowledge to the remote village and the farmer's boy, who otherwise must lose it, it assures a more educated people and a nobler commonwealth. No recent legislation upon the subject is more important and significant. It is another illustration of the larger comprehensive and sagacious spirit which is placing New York in the van of educational progress.

We must emancipate ourselves from the delusion that the concern of the state begins and ends with the primary school, or that the state provides for the education of all its children that they may be able only to read a newspaper, to keep an account, and to make out a bill. The public end of education, indeed, is not to make accountants or engineers or specialists of any kind, but enlightened, patriotic, upright, public-spirited citizens. In primary education we give the children keys and tools, but our duty includes showing how to use them. To teach a child to read is indispensable, but to teach him to read is not to teach him to read with profit. Yet one is as much a part of education as the other, and the public good sense that sustains the school, not a rigid theory of the limited function of the state, must determine the limits of instruction. Moderation, says Bacon, must be the rule; but an occasional excess, he says, is wise.

Higher education is of the highest concern to the state, because higher education is only more education, larger knowledge, completer training. There is no point in education at which indispensable knowledge ends and fanciful knowledge begins. Pope's sparkling gibe, "a little knowledge is a dangerous thing," is a caustic fling at smatterers. But all knowledge is comparative. The knowledge of great specialists and scholars is only larger than that of those who know less. The contemporaneous knowledge of science which Pope himself revered has been long since superseded,

and measured by the science of to-day, is the merest little knowledge which Pope derided. Even while the poet was writing the line, the profoundest scientific scholar in England, Sir Isaac Newton, was saying with the sublime modesty of greatness, "I do not know what I may appear to the world, but to myself I seem to have been only like a little boy playing on the seashore, and diverting myself in now and then finding a smoother pebble or a prettier shell than ordinary, whilst the great ocean of truth lay all undiscovered before me."

Higher education means only more education, and the argument for education is not only an argument for the primary school, but for the academy, the college, and the university. The more languages a man hath, the more man is he. If it be well to know a little Latin or a little German or a little French, it must be better to know more of them; and if a man's mental horizon is widened, his moral powers quickened, and his service to mankind enlarged by conversing with the creative genius of all time, by familiarity with Homer and Dante and Shakespeare and Cervantes, his manhood will be the more ennobled if to this power he can add the skill to bind the sweet influences of the Pleiades or loose the bands of Orion.

Before our Civil War the public man who proposed to estimate the value of the Union was popularly scorned as a political parricide. He was calculating the life of his parent. To the public instinct the life of the Union was a sacred life, and therefore incalculable. Such also in this country is the value of education. We pay it instinctive reverence. In the remotest village when the farmer's boy returns to his native hills a scholar of renown, I have seen the respect that follows him, as if every citizen were conscious of more reasons for pride in the village and for a sense of greater dignity in every villager. If any American should ask of what use is all this education, the question would be as bewildering as if the traveler along this river should ask of what use is all this glorious landscape of the Hudson, of what use to know that it was the gleaming pathway of Western empire, that yonder Hendrik Hudson sought for a shorter passage to the Indies, and that holding that shining water the British crown hoped to hold America. What could Numa have answered if Egeria had asked him what was the use of loving her? What could Galileo have answered if the Inquisition had asked him what is the use of measuring the courses of the stars? What Shakespeare, if he had been asked the use of revealing in immortal verse the secret play of the human soul? What shall we answer if we are asked the use of hearing the tale of Troy divine, or listening to Plato in the garden, to Aristotle in the grove?

Or again, what is the reply if we are asked what is the use of tracing the laws that govern exchanges, prices, currency, money? What is the use of comparing the problems of state socialism and nationalism with those of individualism and the old *laissez faire*? What is the use of studying

the great question of immigration, and of deciding whether we can rightfully risk, by admitting within our gates vast masses of unassimilated and alien ignorance and pauperism and crime, the interests of civilization and liberty which have been committed to our guardianship? What is the use of understanding ourselves, our situation, our powers, and our duties? What is the use of making America a prouder name in human history, because signifying greater beneficence to mankind, than Greece whom the gods of beauty loved, or Rome crowned with the imperial sovereignty of the world? These, and such as these, are the questions we ask when we ask what is the use of education? Education is the entrance of the soul into its rightful dominion of intelligence. To make better citizens and nobler men, to extinguish ignorance, disorder, and crime, in the wisdom that comes of knowledge and an enlightened conscience, — for this your academy and all your schools were founded, for this those schools should be evermore munificently maintained. As plants turn instinctively to the light, the human soul turns towards truth, and every school that we wisely open ministers, however humbly, to the fulfillment of this noblest of human aspirations. Our intelligence is the divine spark within us, and the more carefully we cherish it and fan it into flame, the more certainly will the world in which we live be enveloped in celestial light, and human life fulfill its divine purpose.

GOVERNMENT OF STATE UNIVERSITIES[1]

By Jacob Gould Schurman

The state-supported universities are governed by boards of regents or curators or trustees, who are in some cases elected by the people and in others appointed by the governor of the state. I now proceed to inquire how this arrangement harmonizes with the idea of a university.

No one would pretend that the governing board of a state university is committed to any dogmas like the articles of faith of a religious denomination; yet there are possibilities of oppression or restriction for the university which must not be overlooked. The people may elect, or the governor appoint, regents (or trustees) not only who belong to a particular political party, but because they belong to it. They may be all Republicans or all Democrats, or all of some other political stripe. I do not know that such a thing has ever actually occurred in any of the many states which now have state universities, and in most of them it would be impossible. But I make the extreme supposition in order that we may clearly realize the force of the objection I am endeavoring to describe. Here then is a board of regents made up wholly of men who belong to one political party, and because they belong to it. How will the idea of the university fare in the hands of such political partisans?

[1] From an address of President Schurman to the National Association of State Universities, 1909.

Before attempting to answer that question I must crave your indulgence while I describe another hypothetical situation. The university is not the only public institution supported by the state. There are many others, including, for example, hospitals for the sick and asylums for the insane. These institutions are also controlled and administered by boards of managers, who are generally appointed by the governor of the state. Let us suppose now that the same practical considerations which led to the appointment of a Republican or a Democratic board of regents for the state university necessitated also the appointment of a Republican or a Democratic board of managers for the state insane asylum. How will these political partisans administer the trust and care for the unfortunate wards committed to them by the sovereign power of the state?

To ask such a question is to answer it. These men will perform their public duties like any other American citizens who might have been selected to undertake them. With one exception, of which I shall have more to say in a moment, the fact that the managers are all of one political party will make no difference in their administration of the asylum. Whether of one political party or more, or of no political party, the managers in any event will desire to conduct the public business committed to them with reasonable efficiency and economy. And the members of the board, however constituted, would always feel that this is what the public expected of them. Even a board composed entirely of members of one political party would not consciously and deliberately defy or ignore that expectation. But such a board is always exposed to one temptation which cannot arise in a board differently constituted. A board wholly Republican or wholly Democratic is pretty sure to select such officers or employees as it appoints from its own political camp, and perhaps on the recommendations of political leaders; and the favoritism which leads to the appointment of such candidates is apt to protect them afterwards against the just and salutary penalties that should be inflicted for neglect of duty or incompetency in office. In this way the administration of a state asylum may be seriously impaired, if the managers be entirely of one political party. And to some extent this danger is imminent when a considerable majority of the managers are of the same political party. In the best administered asylums the danger is avoided by having all appointments in the hands of the superintendent and holding him responsible for the results.

This example enables us to measure the danger to which a state university may be exposed from a board of regents who are political partisans. The vital point is the matter of appointments. If the board on its own motion makes appointments, they will be made on political grounds or on other grounds foreign to the life and spirit of the university, and the institution might as well close its doors. It has a name to live, but it is dead. On the other hand, if the board acts only on nominations made by the president, and if before making nominations the

president (who, if he thinks of anything but the merits of the candidates, profanes his high office) also consults and advises with the dean and members of the faculty who profess cognate branches of learning, then it would seem to matter little whether the members of the board of regents were all men of one political party or of none. The faculty is the university; and if its members are selected by their peers, and on the basis of ability and scholarly or scientific attainment and achievement, the life of the university goes on inviolate. Or, rather, it would go on inviolate, if this governing board of political partisans did not choose to interfere at another point, where interference is at any rate conceivable.

Here the analogy with the administration of the state insane asylum does not help us. For the managers of an asylum, however intense their own political convictions and sentiments, cannot conduct a propagandist campaign or make converts among the insane. But a board of regents composed of political partisans might conceivably desire to use the university for such purposes. These ends are, however, so alien to the life and objects of the university that, as experience happily shows, even a partisan electorate would not tolerate the spectacle of such a shameful perversion of functions and aims. A board of regents which attempted it would be overwhelmed with obloquy and disgrace.

A board of political partisans might, however, with more prospect of success, interfere with the teaching of some professor whose views were opposed to their own political dogmas. The members of a Republican board might resent free-trade teachings; and a sympathetic exposition and defense of socialism might bring down upon the head of the professor the objurgations of either Republican or Democratic regents. This danger is a very real and serious one in cases in which the members of the board reflect the views, sentiments, and prejudices of a large majority of the people of the state. A newspaper campaign is inaugurated (or, under the conditions, inaugurates itself) against the "heretical" professors, and they and their teachings are denounced from one end of the state to the other. When the legislature meets, the matter is made a subject of legislative investigation. And it is inevitable that the fundamental relation between the university and the state should be thoroughly canvassed. At such a time legislators and voters, too, are likely to ask whether the state should vote public money, whether citizens should tax themselves to support an institution which is instilling into the minds of the picked young men and women of the rising generation ideas and theories utterly opposed to those which they and their fathers have long entertained and devoutly cherished, and which they believe to be essential to the sound life of the body politic or even to the nobility of individual manhood. This is the supreme crisis for the state university. Freedom of thought, freedom of investigation, freedom of teaching, freedom of publication, — this is the soul of a university. And dictation from the state is just as much tyranny as dictation from the church. Truth must

judge itself; it cannot be determined by counting noses. One man with God is a majority. The professor must be left free to follow the dictates of reason and the demonstration of evidence, even though his conclusions are at variance with the beliefs (or prejudices) which the mass of mankind regard as fundamental truth. And if a state university cannot insure him that freedom, it is to that extent not a university at all. As in the denominational university the last word would be spoken not by the intellect but by some power outside it, — by a board of trustees, by a legislature, or by a majority of the people of the state.

Like other institutions the state university is on trial. *The supreme test is whether the people of the state will, on the one hand, tax themselves to support it, and, on the other, impose upon themselves a self-denying ordinance to leave it severely alone; so that it may select its own members by the application of its own intellectual standards, and the members thus chosen may be absolutely free to investigate, to teach, and to publish whatever they believe to be the truth.* If our people do not already possess this conception of a university, they must be educated up to it, for a university cannot flourish on any other condition. I need scarcely point out that the general acceptance of this view would be greatly facilitated by the constant recollection on the part of the professors of the maxim that freedom implies obligation, and that in this instance the obligation imposed is that of self-restraint, along with the courtesy to be expected of gentlemen and that tact which mitigates or avoids the asperities of embarrassing circumstances.

A university which has an organic connection with the state possesses not only the advantage of state support; it has the privilege and the duty of serving the state. Of course its service is rigidly limited to the educational, scholarly, and scientific interests of the state. But in these days those interests are very extensive and very diversified. One of the most important is the provision of teachers for the high schools and normal schools of the state. This function is likely to increase in importance with every passing year. Our secondary and elementary schools are inferior to similar schools in France and Germany. To make them more thorough and efficient we need better teachers. There is no other remedy. And better teachers will be demanded just as soon as communities discover that this is the only way to reform. These teachers must, for the high schools, be furnished by the universities. And a state university, which is the crown and climax of the educational system of the state, has in these circumstances a unique opportunity and privilege which any privately endowed university must envy. Even the privately endowed university, however, may share in this splendid work. And it is its misfortune — I will not say its fault — if among its graduates there is not a considerable number who intend to devote themselves to the teaching profession. Certainly there is an obligation incumbent on the state universities to educate teachers for the schools and to create and intensify

enthusiasm for the teaching profession. From the point of view of the public this is quite as important as graduating lawyers, physicians, or clergymen.

But a state university will not content itself with any object short of the entirety of educational, scholarly, and scientific interests of the state. It has in this respect an advantage over the privately endowed university, — an advantage reflected in the constitution of the governing board, to which I have already referred. The scope of the privately endowed university is narrower, its program less diversified, than that of the state university. It is in the state universities that the scientific and intellectual interests of the community are reflected in their entirety. As these universities are dependent on the people as a whole for their support, they are sensitive to the intellectual needs of the people wherever and whenever they arise. There is no work, no calling, no human activity too humble for their consideration, if only science or knowledge can be of use in it. On the other hand, as the people support the university, no section of the community will tolerate the neglect of its peculiar problems. Hence it is that the state universities have such a multiplicity of departments and comprehensiveness of curriculum. Their province is the totality of human knowledge and its application to the life and work and vocations of mankind. Agriculture is cultivated side by side with law, and the mechanic arts with medicine. The action and reaction of a university and the people of the state upon each other is mutually advantageous. Of course the people are aided and elevated by knowledge; but it is also an advantage to the university to be kept in close touch with concrete scientific problems and with knowledge that is useful; the university is thereby saved from scholasticism and barrenness. It may be said that this work is utilitarian; but if so, it is utilitarianism which is characterized by intellectual service to mankind. A more serious objection would be that this activity of the university in practical spheres might atrophy the wings of reason and keep it from soaring into the heights of speculation. That, however, is an indictment which De Tocqueville brought against American democracy before the state university came into existence. And it should be noticed that the activity which the state universities exhibit in practical affairs, like farming and engineering, is itself a theoretical and rational activity. And I see no reason why facts concerning crops, stock, railways, and factories should not be as stimulating to pure reason as any other groups of facts. Certainly Darwin, the greatest scientific speculator since Newton, took as the starting point of his theories the data gathered by gardeners and stock breeders.

The attitude of our people towards their state universities is a sublime and encouraging spectacle. It is, however, as wise and farsighted as it is touching and impressive. For the life of states, like the life of individuals, is dependent on foresight, and foresight is the counterpart of that exact and systematic knowledge which we call science, of which the

university is the organ and workshop. The best guides and the chief helpers of the community are not the politicians and financiers, who fill the public eye, but the scholars and the scientists. The universities are to a nation what eyes are to an animal. And since in our republic the federal government has nothing to do with education, it devolves on the states to supply the universities. Their origin and support can no longer, in the United States, be left to the caprice and uncertainty of private generosity, helpful as that generosity may be. Education from the elementary school to the university is the concern of the state. The majority of our states have recognized this obligation and provided state universities. The West has led, but the East is following. And before many years a state without a state university will be an anomaly in our Union. For the rest, I assert most emphatically that a state university is an indispensable organ of genuine democracy.

WORKINGMEN AND HIGHER EDUCATION[1]

Any organization of higher education which is based on the assumption that education of a "general" kind is desired or needed only by those entering the professions, while technical education alone is suitable for persons engaged in manual labor, is fundamentally mistaken. It is, of course, true that the education of the majority of the former may be predominantly of the "general" kind, while that of the majority of the latter may be predominantly "technical." But technical and general education ought not to be distinguished on the ground that they are fit for different classes, but because they stimulate different sides of the same individual; and in our opinion a man who will, throughout life, work with his hands needs a general education for precisely the same reason that it is needed by a specialist like a lawyer or a doctor, in order that he may be a good citizen and play a reasonable part in the affairs of the world. Manual labor (except when accompanied by undue pressure) does not in any way disqualify a man for receiving such an education, and indeed the whole principle involved in the absolute distinction which is sometimes made between physical and intellectual work is open to the objection that it rests upon an unsound psychology. The truth is that the education of every class must keep two objects in view, because in a democratic community every man and woman stands in a twofold relationship to the rest of society. On the one hand, as a workman, whether with head or hand, he must obtain the technical qualifications needed to maintain him in independence or to advance him in life. On the other hand, as a member of a self-governing nation he must acquire the civic qualities which enable him to coöperate with his fellows and to judge

[1] From Oxford and Working-Class Education; being the Report of a Joint Committee of University and Working-Class Representatives on the Relation of the University to the Higher Education of Workpeople.

wisely on matters which concern not only himself but the whole country to which he belongs. In the words of a workman, a student, and a trade unionist:

The education required is not a mere bread-and-butter education, which will only make the worker into a more efficient wealth producer. It may be very good for the commercial prosperity of the nation that our workmen should be higher skilled and more capable than their brethren in America or in Germany; but when education has merely made a man into a better workman, it has not done all that it can for him, nor all that he has a right to expect. The time has come for the workingman to demand a share in the education which is called "liberal" because it concerns life, not livelihood; because it is to be desired for its own sake, and not because it has any direct bearing upon his wage-earning capacity. By the avenues of art, literature, and history it gives access to the thoughts and ideals of the ages; its outward mark is a broad reasoned view of things and a sane measure of social values; in a word, it stands for culture in its highest and truest sense. This "liberal" education should be a common heritage. But in this, as in many other things, the working class has been for long a disinherited class, and the national universities, which are the natural fountainheads of national culture, have been regarded as the legitimate preserves of the leisured class. This state of things has not only wronged the working class; it has to a great degree sterilized the universities themselves.

VII

PROHIBITION

THE SALOON AND THE LAW[1]

By Governor Folk

The liquor traffic should be regulated by strict laws, and those laws vigorously enforced. We need a law prohibiting brewers and distillers having an interest in dramshops. The criminal saloons are often the brewery-owned saloons. Competition between breweries compels them to take a low class of men and set them up in business. These men have no sense of proprietorship or pride in running a decent place, and these saloons often become dens of vice and lawlessness. Effective local-option laws for counties, towns, and cities should be enacted.

More important than this, however, is some measure to secure the enforcement of the dramshop laws throughout the state. We have dramshop laws closing saloons on Sunday, and otherwise regulating the liquor traffic. These laws have been enforced for the past several years in the cities of St. Louis, Kansas City, and St. Joseph, through the excise commissioner and the police commissioners appointed by the governor. Outside of these cities the state has no power whatever to enforce these laws, and in a number of the counties the dramshop laws are openly and flagrantly violated. I have suggested as a remedy for this condition a state-excise-commissioner law. Several states have such a measure, with most satisfactory results. There has been a state excise commissioner in New York state for ten years. There has been a state excise commissioner in the city of St. Louis for many years, and no one would, I think, advocate the abolition of that office without providing something equally as good in its place. The measure proposed would not interfere with local control. County dramshop licenses and municipal dramshop licenses would continue to be issued and revoked as at present, and by the same authorities. The excise law suggested provides for a state license only. There is no state license under the present statutes. The excise commissioner would have jurisdiction only over the state license, and would have nothing to do with the county or municipal licenses. In order to insure thorough local control, the state license should be issued only after the county court has approved the application for a county license. The

[1] From a special message, April 9, 1907.

excise commissioner would thus have no power outside of the large cities, where the approval of the county court is not required, to put a man in business or to keep a man out of business. Either the county court could put the dramshop keeper out of business by revoking his county license, or the excise commissioner could revoke his state license in the event local control should fail. In order to prevent any possible abuse of the power by the excise commissioner, the circuit courts of the several counties should be given the right of review of the evidence on appeal by any person aggrieved. The worst that abuse of power on the part of the excise commissioner could do, would be to deprive some county of a saloon temporarily. This would not be a great disaster. Even were it so, under the plan proposed the circuit court could soon relieve the drought. Objection has been made that a state excise commissioner might build up a saloon machine. That would be impossible, for the county courts could revoke the county license of a dramshop keeper should the excise commissioner attempt to indulge him in lawlessness. Two thirds of the saloons of the state are now, and have been for years, in control of the governor's appointees in the three large cities of the state. No one can truthfully say that there is now any machine of the saloons made by that control, or that the governor has used his power in that respect for his personal or political ends in any way. Under the proposed law the governor could not build a machine out of the excise power if he wanted to. Absolute local control is provided for. As long as there is local control of saloons in any county there will be nothing for the excise commissioner to do there. It is only when there is no local control that he comes in. Where there is local self-government of saloons the excise commissioner would not be called upon. There are some who object to the idea of a state excise commissioner on the ground of one-man power. The excise commissioner's power is limited by the county courts and the circuit courts, and to be used in connection with the local authorities. He would not have nearly so much power as a state banking commissioner, with the absolute control of all the banks in the state, and no one claimed that the banking-bureau law created a one-man power. Such power as the excise commissioner would have would be for the enforcement of law. If a one-man power is needed to correct lawlessness, would it not be better to have one-man power to enforce the law than to tolerate the saloon power to disobey the law. There is far less danger in official power to execute the laws than there is in the saloon power to defy the laws with impunity. Those who concern themselves lest some man be given too much power to compel obedience to the statutes of the state relating to saloons, do not seem to be at all disturbed when other lines of business are proposed to be controlled through state authority. It is not suggested that the state take absolute control of all the saloons of the state. It is best, as the proposed measure does, to leave the control locally and allow the law to be enforced by local officials, if they will do this; but if they will not, then the state

protects its laws from violence. The excise law, instead of interfering with local self-government, restores it where it has been superseded by saloon sovereignty.

This measure is not unprecedented. It is not revolutionary. It is in accord with the well-established policy of the state for half a century as to interests affecting the general public. To illustrate: When a child is born he is under the care of a doctor controlled by the State Board of Health. The milk and butter that he eats and drinks are under the control of the State Dairy Commissioner. Later on, the dentist that fixes his teeth is under the control of the State Dental Board. The teacher that instructs him is licensed by the State Superintendent of Schools, who may revoke the license. The pharmacist from whom he obtains his medicine is regulated by the State Board of Pharmacy. The barber that shaves him is regulated by the State Barber Board; the insurance company in which he insures is regulated by the State Insurance Department; his mines, if he acquires any, are regulated by the State Mining Bureau; the railroad on which he travels is regulated by the State Board of Railroad Commissioners; the birds that he hunts are looked after by the State Game Warden; the fish that he catches are propagated by the State Fish Commission; his horses, if he has any, are subject to the State Veterinary Board; his factories are regulated by the State Factory Inspector; the bank where he deposits his money is controlled by the State Banking Department; the corporation in which he may have stock is regulated by the Secretary of State; the building and loan association in which he may invest is regulated by the Building and Loan Supervisor; his beehives are regulated by the State Inspector of Apiaries; the osteopath who treats him is regulated by the State Board of Osteopathy; if he makes his will, the lawyer who writes it is licensed by the State Board of Law Examiners; and when he dies he is buried by an undertaker regulated by the State Board of Embalmers. But if during life he visits a saloon open on Sunday, contrary to law, he finds that this is the only business affecting public morals that the state does not regulate, because some one says it will interfere with local self-government. What inconsistency! Why is it that the plea of local self-government was not set up against the state regulating the mines, the railroads, the insurance companies, the banks, the dentists, the barbers, the beehives? It is only when the saloons and gambling interests are sought to be brought within the law that local self-government is invoked. At the regular session of this assembly laws were enacted placing all the banks of this state under the control of a banking commissioner; putting the beehives under the State Inspector of Apiaries; placing the roads under the supervision of the State Highway Engineer; providing for a state game warden to enforce the laws to protect the birds of the air and the fish that swim in the water; providing for state control for the weighing of grain in all public warehouses; making foodstuffs subject to the inspection of the State Food Commissioner.

There was nothing heard about self-government when these were being considered. But when it is urged that the state have some authority to enforce its laws against the liquor interests, the situation in the minds of some assumes a different aspect, and the cry of self-government is raised, although real self-government is in no way affected by the excise law. Why should there be so much straining at the excise law, when all these other state control measures have been swallowed so easily? Either all of these things should be left entirely to the regulation of the localities, or the saloons, that need regulation more than all the rest, should likewise be regulated. One cannot consistently indorse the state control of these and then deny the right of the state to regulate saloons on the plea of self-government. There is just as much self-government in a locality regulating a bank as a saloon. Local self-government of the kind that attacks this measure is not often heard of unless saloon sovereignty or gambling sovereignty is threatened by the assertion of state sovereignty. We hear nothing of local self-government when banks, railroads, and mines are regulated by the state; but it becomes frantic when lawless saloons are sought to be controlled, even remotely. The saloons and gambling interests cloak themselves in self-government and insist that the state has no right to step in and make them obey the law. Of course the state has done this very thing as to all other interests; but in each of these cases the state has exercised the right without question; no lawless elements were involved. If the saloons were here asking to be regulated, as the banks have come, and the barbers have come, and the pharmacists have come, and as the saloons would come if they desired to obey the law, what reason could be given why their request should not be granted? It could not be denied them for lack of precedent, for this is the only interest not regulated. The mere fact that they do not come asking for measures requiring the lawless among them to observe the law is all the more reason why the state should compel obedience to its laws, whether they wish to obey or not. I believe the liquor interests should be made to obey the law, just as the bankers and barbers and dentists are compelled to obey the law. The saloon keeper has no right to demand the special privilege of wanton lawlessness. I believe the state should say to this interest, "You shall be controlled locally, so long as you are controlled locally, but you must do business according to law, or you shall not do business at all."

Conclusion

These are the only subjects embraced in the call convening this session. During your deliberations occasion may arise to submit other matters, but this will not be done unless I consider them of such grave importance as to demand attention at once, for I realize after your arduous labors of the regular session it would be imposing a hardship on you to bring your attention to other than measures of vital consequence. Some of

the subjects I have spoken of, and that are embraced in the call for this session, were hastily considered by you in the regular session. They are things I think the people of the state want, and which I believe they should have. While I might have taken refuge behind the efforts made at the regular session to give the people all the reforms promised, I feel I would not have been doing my full duty in carrying out the pledges made to the people by such a course. This special session will, I trust, round out and complete the work of reform so well begun at the regular session. Permit me to express the hope that your deliberations will be pleasant and harmonious, and to assure you of my cordial coöperation in every endeavor for the public welfare.

THE NATION'S ANTIDRINK CRUSADE[1]

By Ferdinand Cowle Iglehart

In two thirds of all the territory of the United States the saloon has been abolished by law. Forty years ago there were 3,500,000 people living in territory where the sale of liquor was prohibited. Now there are 36,000,000 people under prohibitory law. Since that time the population of the country has scarcely doubled, while the population in prohibition territory has increased tenfold. There are 20,000,000 people in the fourteen southern states, 17,000,000 of whom are under prohibitory law in some form. In 1900 there were 18,000,000 under prohibition in the United States; now there are 36,000,000. In eight months statewide prohibition has cleared the saloon from an area as great as that of France. In that area there is a solid block of territory 320 miles north and south by 720 miles east and west, in which on the first day of next January a bird can fly from the Mississippi to the Atlantic Ocean, and from the boundary of Tennessee to the Gulf of Mexico, without looking down upon a legalized saloon. Great Britain and Ireland could be set down over this space without covering it. There would be 10,000 square miles of "dry" territory left as a border.

This is not the first wave of prohibition that has swept over the country. Fifty-four years ago there was one that swept over the northern states with as great violence as the one that is now passing over the South. Then Maine, New Hampshire, Vermont, Rhode Island, Connecticut, New York, Delaware, Michigan, Indiana, and Iowa, by acts of their legislatures, forbade the manufacture and sale of intoxicating liquors as a beverage. Nine northern states went "dry" in a single year, the year 1855.

The liquor men, dazed and frightened at the revolution, set themselves desperately to resist it. By one pretense or another there was widespread nullification of prohibition. One state after another receded

[1] From *Review of Reviews*, April, 1908. Reprinted by permission.

from its radical action, until nearly all adopted the system of license. So that, up to a year ago, of the eighteen states that had tried the experiment of prohibition, only three — Maine, Kansas, and North Dakota — remained in the ranks, they having adopted constitutional prohibition.

Will the present prohibition legislation be ephemeral, like that of half a century ago, or will it be permanent? There is every reason to believe that it will be permanent. There were more elements of permanency in the earlier movement than appeared on the surface; for during all the years that the states were falling out of the prohibitory column the people were steadily removing the saloon by "local option," till, at the time there were but three prohibition states left, the liquor traffic had been abolished from two thirds of the territory occupied by one half of the population of the United States. Of the 36,000,000 people who have expelled the saloon, only 10,000,000 have done so by state prohibitory laws, and 26,000,000 have effected the removal by local option.

Georgia, the Southern Pioneer of Prohibition

Last summer Georgia became the first southern state to adopt prohibition. At the close of the Civil War the free negro and the country saloon were bad companions, fostering a bad civilization. A law was passed forbidding the sale of liquor within three miles of a church or school. Then county local option was adopted, which drove the saloon from the farming districts and towns generally. But the jug trade from the "wet" into the "dry" counties became so great and annoying that the temperance people pushed the fight successfully into counties containing cities. When the Georgia legislature met in July last there was not the slightest idea in the mind of any friend or foe of whisky that a prohibitory law would be enacted. The most that the enthusiastic friends of temperance had hoped was that a bill would be passed allowing the people to vote on the question at some future time. But a local-option bill was passed in the Senate by a vote of 34 to 7, and in the House by a vote of 139 to 39. On the day of the final passage of the bill representatives of religious denominations and temperance organizations from all parts of the state assembled in the capitol grounds and building, members of the Woman's Christian Temperance Union being very much in evidence. When the result was announced a scene of indescribable enthusiasm was witnessed. The crowd spontaneously burst out into "Praise God, from whom all blessings flow." Withered-faced old women clapped their hands and shouted aloud for joy; old men fell in one another's arms and wept like children. Seaborn Wright, the leader of the prohibition forces in the assembly, was placed on the shoulders of men and carried through the capitol, while the throng sang lustily "Gloria in Excelsis." Governor Hoke Smith promptly signed the bill and has since vigorously enforced it.

The Georgia law in reality affected only fifteen counties, as 135 of the 150 counties of the state had already gone "dry" by local option.

Oklahoma's Action

There was a very fierce contest over the liquor question in Oklahoma. Congress, in the enabling act, required prohibition for twenty-one years in the Indian Territory section of the new state. In the election of delegates to the constitutional convention the liquor question was one of the foremost. Then the pressure was made by both sides on the delegates to incorporate or leave out of the constitution a prohibitory provision. The convention prepared a constitutional provision, but made it necessary for the people at the polls to determine whether they would make it a part of their constitution or not. After an exceedingly exciting contest the prohibitory provision was adopted and incorporated into the constitution; and so Oklahoma, the first state of the new century, and the youngest of Columbia's daughters, hastened to join her sister Georgia in the abolition of the saloon.

Alabama joins the Procession

The wires had scarcely carried the word that the President had accepted the new state of Oklahoma, with its prohibition amendment, when the legislature of Alabama passed a state prohibitory law, to take effect on January 1, 1909. The original excise law had been amended from year to year, allowing privileges of local option to special localities, till the saloon had been driven out of twenty counties. As the sessions of the legislature are only quadrennial, the antisaloon people determined last winter to make the best of their opportunity and urge the passage of radical temperance measures. Laws were passed allowing local option for counties, preventing the shipment of liquors from "wet" into "dry" territory, compelling temperance instruction in the public schools, and forbidding the sale of "hop jack" and other drinks containing a small percentage of alcohol. Governor Comer called a special session of the legislature last November to consider the differences between the railroads and the state. He did not make any mention of the temperance question in his message, as he did not intend that it should be considered until the regular session three years hence. Because he did not make mention of it a two-thirds majority was required to carry such a measure. When the members arrived at Montgomery they would not give a single thought to the railroads till they had "expressed" the saloon out of the state by the adoption in the Senate of the House bill prohibiting the manufacture and sale of liquors as a beverage by a vote of 32 to 2.

State-Wide Prohibition in Mississippi

In Mississippi the country saloon was spoiling the negro, and instead of a three-mile limit, as in Alabama, the people pushed the saloon five miles away from a church or school, which cleared the farm districts of the crossroads groggery. In 1886 they adopted local option and removed the saloon from the rural districts and from the small towns.

When they came to their constitutional convention the Prohibitionists tried very hard to get a prohibitory clause in the new constitution, but the Southern people were so bent on the question of the domination of the white man that they would not allow any other one to interfere.

Up to a year ago the people, by local option, had driven the saloon from 69 out of the 76 counties, which included 90 per cent of the territory of the state. A few weeks ago the legislature met, and quietly, and by almost a unanimous vote in both Houses, adopted state prohibition, to take effect on the first day of January, 1909.

North Carolina to vote this Month

It seemed a race between North Carolina and Mississippi, to see which one should reach the goal of prohibition first. By the local-option laws the people of North Carolina had expelled the liquor traffic from 62 of the 97 counties of the state and from all but 30 towns and cities of the same, 99 per cent of the territory being "dry." On January 28, this year, the House of Representatives at midnight passed the Senate bill for a state election on prohibition the last Thursday in April, and on that day the people, without doubt, will make swift work of the abolition of the saloon there. Of the many earnest temperance workers Governor Glenn is the most prominent and influential.

The Movement in Tennessee and Kentucky

Tennessee, after fourteen years of hopeful warfare against the liquor trade, on February 1, 1907, passed the Pendleton liquor law, which made the Adams law general throughout the state, and has been the most powerful factor in a swift movement toward the abolition of rum. There were fierce contests for the abolition of the liquor traffic in the cities of Clarksville, Bristol, Knoxville, and Jackson. In these cities on election day men, women, and children marched through the streets singing temperance and religious songs, and filled the churches for services of prayer. All but 5 of the 96 counties of the state are now "dry," and only 3 cities — Memphis, Nashville, and Chattanooga — remain "wet."

The relation of Kentucky to the whisky business is a matter of surprise to the whole nation. The state has $160,000,000 invested in distilleries. Through local-option legislation it has expelled the saloon from

94 out of 119 counties, from 370 towns of the 425 towns and cities, and from 97 per cent of the territory of the whole state. The bitterest fight was carried down into Louisville, the headquarters of the liquor forces. Because the mayor of that city would not enforce the law closing the saloons on Sunday, charges were preferred against him and Governor Beckham removed him. The fight there was well-nigh tragical. It became the issue for the next municipal election, and at the one held last fall James F. Grinstead was elected mayor, defeating Owen Tyler, who stood for a repeal of the Sunday-closing law. In the last gubernatorial election the Antisaloon League forces thought they discovered a secret friendliness between the Democratic leaders and the whisky forces of Louisville, and, though these leaders flatly denied the fact, the suspicion became strong enough to drive thousands of temperance people away from the Democratic party and elect Governor Augustus E. Willson and all the rest of the Republican ticket by a substantial majority. The jail keepers of Kentucky recently appeared before the present legislature to ask for a special appropriation, assigning as the reason that the closing of the saloons had so diminished crime that they did not have prisoners enough left within the jail walls to furnish board money to apply on maintenance. Kentucky, like Tennessee, will vote for state prohibition whenever the people care to do so.

In the Old Dominion

Virginia, the mother of states and statesmen, is trying hard to keep the swift pace the South has set toward prohibition. The Mann liquor law gave the first severe blow to the saloons of the state. It removed them from the rural districts. In a few years 1000 saloons, or one half of those in the state, have been abolished. Two thirds of all the saloons now open are found in 3 cities, and one half of all the "wet" territory is confined to Norfolk and its vicinity. Of the 140 incorporated towns 120 are "dry." Of the 100 counties 73 have no saloons. Some have, however, a dispensary or distillery here and there. There are 46 counties where no form of license is issued. There are 5 counties in the northern neck of Virginia in which the total number of the black population outnumbers the white, and from which the saloons have been expelled, which furnish the most marvelous minimum of crime, the jails of the 5 counties having only 3 prisoners.

Of the 1,000,000 inhabitants of West Virginia 700,000 have abolished the liquor traffic. Of the 55 counties 29 are "dry," 10 have drinking places in but 1 town each, 4 counties have saloons in but 2 towns each, and 2 counties have saloons in 3 towns. The constitution of the state empowers the county commissioner to grant or refuse a liquor license. The legislature has granted to the councils of certain cities and towns the right to issue licenses, which they have done.

Delaware and Maryland

The legislature of Delaware in March, 1907, provided for a vote on November 5 on the question of the manufacture and sale of intoxicating liquors. One half of the state, the counties of Kent and Sussex, went "dry"; the other half, rural Newcastle County and Wilmington, retained its rum.

Maryland has expelled the saloon from one half of its area, and from the environment of about one third of its population. Of the 26 counties 10 are entirely "dry," 4 are completely "wet," and the rest of the counties are "wet" and "dry" in spots. Like some other states, Maryland has granted special local temperance legislation. Each county or district or village has asked for special laws. There is a marked advance in temperance sentiment and action. Increased local-option privilege including the residential districts of cities is asked. Cardinal Gibbons recently wrote an open letter which is significant; in it he said, "I believe that the right of people to determine by the operation of local-option laws whether saloons shall or shall not be closed in their respective communities is in harmony with the American principle of self-government."

The "Dispensary" in South Carolina

South Carolina has had the "dispensary" system in the sale of liquor for fourteen years. It is a system of state control of the liquor traffic. In 1896 Senator Tillman secured the incorporation of the dispensary into the state constitution. As a revenue producer, when honestly administered, the system is a success. As a moral measure the dispensary is a failure. Its record of vice and crime shows an increase over the license system. The total excess for six years under the dispensary system over that of the license system was: assaults, 1080; homicides, 157; and violations of the liquor law, 2051. For the six years following the introduction of the system there was an increase of 40 per cent in assaults, and almost 100 per cent increase in homicides, over the six preceding years under license. The Carey-Cottigan bill killed the state dispensary, but as a compromise it allows local option as to whether a reformed dispensary or prohibition shall be maintained. There are 41 counties in the state, 23 having dispensaries and 18 being "dry."

Local Option in other Southern States

The local-option law was put into the constitution of Florida in 1887. Of the 46 counties in the state, 33 have prohibition and 13 permit the sale of liquor. There are only 22 incorporated towns which have saloons. Laws against selling in prohibited territory are very stringent. About three fourths of the people in the state live under prohibitory law. Governor Broward is one of the strongest enemies of the saloon.

The supreme court of Louisiana has just rendered a decision which guarantees the efficiency of the local-option bill amended in 1902. Under that law, of the 59 parishes in the state 24 have outlawed the saloon, and many other sections of the state have done the same. The stronghold of rum, of course, is New Orleans, with its 325,000 population and its 2000 drinking places. Notwithstanding this influence, two thirds of the territory of the state has voted for prohibition.

Texas, with its enormous area and almost 3,000,000 of population, has waged a terrible battle against the bottle. Local option for many years has been very strong in the state, driving the saloon from one county after another. The temperance people are not well pleased with the Baskin-McGregor law, which they claim is rather friendly to the liquor interests. Of the 243 counties, 147 are entirely "dry," 51 are partly "dry," and 45 permit the sale of liquor. It is thought that seven tenths of the voting population of the state will be ready to record itself in favor of state prohibition when the proposition shall be presented.

In Arkansas the people vote by wards, townships, and counties on the question whether liquor shall be sold or not. They also have a right by petition to forbid a saloon within three miles of a church or schoolhouse. A majority vote of all the inhabitants is required, which includes mothers, wives, sisters, and daughters over eighteen years old. The legislature a year ago abolished crossroad country saloons, stopped liquor salesmen from going into prohibition territory with their goods, and the wholesale houses from advertising liquors in papers and circulars in territory where the sale of liquor is forbidden by law. Of the 75 counties, 58 are "dry." Eighty per cent of the territory of the state has expelled the saloon.

The heroic stand which Governor Folk took as prosecuting attorney and as governor against the lawless elements, not sparing the saloon, has had very much to do with the improvement in temperance sentiment in Missouri. That state has a local-option law, with a county unit excepting cities of 2500, which vote independently. In "wet" territory license may be obtained on a petition of one half of the taxpayers or upon the petition of two thirds of the real-estate owners in a block. Of the 114 counties, 47 are now "dry." Within the past three years 700 saloons have gone out of business in St. Louis alone, as a result of Governor Folk's stringent enforcement of the Sunday-closing law.

The Campaign in the Middle West

In 1880 Kansas incorporated prohibition in its constitution. Directly opposite opinions of the success of the law are held. The liquor dealers are greatly distressed over the failure of the law, and the people of the state generally hold that it is a success. Governor Hoch, of Kansas, in a recent letter, says: "I believe prohibition has been a great benefit to the

state financially, intellectually, and morally. The state has $145,000,000 in its banks, $83 per capita; pauperism is practically unknown; the prison has but little more than when the state had one half its population."

Ohio has always had strong temperance sentiment. It was aroused in 1873 by the women's crusade at Hillsborough under "Mother" Thompson, which was the birth of the Woman's Christian Temperance Union. In 1883 there was a canvass of a state-prohibition amendment to the constitution, in which a majority of those voting on the question were for prohibition, but the proposition failed because a majority of all votes cast for the candidates on the ticket was required to secure the passage of the amendment. The worst enemy the saloon in Ohio and America has, appeared in 1893 when the Antisaloon League was organized. Under the leadership of Governor Foraker the Dow tax law was passed in 1886, which is now in operation. In 1888 the Beatty township local-option law was passed; in 1902 the Beal law, giving local option to cities and villages as a whole, was passed; in 1904 the Brannock law, and in 1906 another local-option law for residential districts in cities. Under these laws 490 villages and cities have expelled the saloon. Of the 1376 townships, 1150 have forbidden the liquor traffic, and over 400,000 people in the residential sections of the great cities have abolished rum. About 68 per cent of the territory is now "dry." The Antisaloon League people of Ohio effected a political revolution which was more marked than the one which took place at the last election in Kentucky. It was the defeat of Governor Herrick on the Republican ticket by Governor Pattison as a punishment for his hostility to the local-option bill, and the election of Lieutenant-Governor Harris and the whole Republican ticket by 40,000 majority as the reward for their pronounced friendliness to the bill. Governor Harris, who is now executive of Ohio, is one of the most persistent enemies of the saloon. A few weeks ago the Rose bill, extending local option to counties as a unit, passed both houses of the legislature and became a law, under which it is understood that 70 out of the 88 counties of the state will expel the saloon.

The people of the Hoosier State are about as enthusiastic on the subject of temperance as they are in Ohio. In Indiana the reformers have their victories through the Moore law, which forbids the saloon by a popular remonstrance. By its use 219 townships and 27 city wards, considerably more than one fifth of the population of the state, have banished their saloons. By these remonstrances 750 saloons have been either closed or prevented. There are now 683 "dry" townships out of a total of 1016. The 5000 saloons are confined to 333 townships; and in 72 out of 92 counties the majority of the voters have recorded themselves against the saloon. The drastic "Blind Tiger" law has been of great service to the reformers. Governor Hanly is one of the most enthusiastic and uncompromising enemies of the liquor traffic in the United States.

The liquor power is very strongly intrenched in the state of Illinois. Chicago has as many saloons as all of the fourteen southern states combined. Until the passage of the local-option bill about a year ago there was nothing but a city and village dramshop law, and the people had no voice on the saloon question. Under the new law the people of every township in the state may vote upon the question of saloon or no saloon in the entire township. A large number of towns and cities voted "no license" at the election last autumn; and within a year 16 "dry" counties have been added to the 10 which already existed, making 26 in all. The saloon has been expelled from the residential districts in cities. The Board of Aldermen of Chicago a few weeks ago refused to issue license to sell liquor to a district one square mile in extent in the southwestern portion of the city, and it is understood that there are at least ten square miles of territory inside the city limits of Chicago where the saloon is forbidden by law.

The enormous brewery interests of Milwaukee put up a desperate fight for the possession of the legislature of Wisconsin a year ago, on the platform of the repeal of every restrictive law, but failed. A residence-district option bill passed the legislature almost unanimously. There is not a county in the state entirely "dry," but local option in towns and cities has banished the drink traffic from one half of the geographical territory of the state, from 708 of the 1454 towns and cities.

Michigan is peninsular, with much marshy ground; there is only one "dry" county out of the 85 in the state, and there are but 50 towns and cities out of 412 that have abolished the saloon.

The people of Minnesota have a township local-option law, and an option for municipalities organized under a village charter. One fourth of the 525 municipalities of the state do not allow the sale of liquor. Twelve hundred of the 1800 organized townships have no saloons. Four hundred of the 600 remaining "wet" townships have no saloons except those in the incorporated villages. About 45 per cent of the population live under prohibitory law. Minneapolis has a patrol-limit system, which confines all the saloons within a small section in the business district and forbids the sale of intoxicants anywhere else. The most important feature of the temperance question in Minnesota is the strict enforcement of the excise laws. Mayor Robinson, of St. Cloud, was removed from office for a failure to close the saloons on Sunday. The decision of the supreme court frightened every mayor and officer of the law, and the result is that St. Paul, Minneapolis, and every licensed city and town of the state are as tight as a drum on Sunday.

In Iowa the people voted in favor of constitutional prohibition in 1883. Upon a technicality the supreme court held the election void. The legislature, however, passed a prohibitory statute. Because of difficulties attending its enforcement in the "river cities" of the state, a so-called "mulct" law was passed, which permits a locality, upon petition of 65

per cent of the voters, to secure an exception to the general prohibition. Of the 99 counties only 22 grant liquor license, and of 1112 towns and cities 975 forbid the sale of rum.

In Nebraska 10 counties out of 90, and 450 out of 1000 towns and cities, have voted out the saloon.

South Dakota had prohibition when admitted to the Union, but by local-option legislation has become a license state. Two out of the 66 counties and 30 of the 136 towns and cities have abolished the saloons.

North Dakota retains the constitutional prohibition which it had when received into the Union. Judge Pollock expresses his estimate of the value of prohibition to the state. He says:

> Our prosperity under prohibition is well-nigh phenomenal; the United States census reports show that North Dakota has the greatest wealth per capita of any state in the Union, and that our farm earnings per capita are the greatest in the nation. We have $100 per capita in our savings banks. The population of North Dakota has increased 70 per cent in the last ten years.

Montana has much "dry" territory in the mountains and plains, but mainly because there are no inhabitants to make it "wet." Butte, the mining center, has been described as a large body of ready money surrounded by whisky. There is a county local-option law. A year ago a wine-room law was passed forbidding a woman's presence in a saloon as a barmaid, a patron, or companion of a patron. The "ladies' entrance" in evidence in all the license states has been abolished there.

Wyoming is a rum stronghold. It is the fifth whisky state in the Union.

Colorado last year passed the Drake local-option bill, which gives local option to a municipality, ward, and precinct. Under the law the temperance forces, including the women, who have the right of suffrage, are waging a warfare against the enemy which promises to clear most of the drinking places out of the state.

The Pacific Slope

In Idaho the temperance people asked of their legislature and expected a local-option law, but instead they were given high license, with some option to the county commissioners in the granting of license to sell outside of incorporated cities. The state gives the municipality power to prohibit the sale of liquor by the passing of an ordinance. By such an ordinance Meridian, twelve miles from Boise, and some other cities have secured prohibition.

Nevada, in proportion to its population, is at the head of the column of the rum states in America. It has a liquor seller for every 49 inhabitants, while in Mississippi there is only one for every 3240 persons. There are more than sixty times as many liquor dealers in Nevada as in Mississippi.

In the state of Washington a year ago the local-option bill was lost by a vote of 43 to 44. The attempt of the liquor men to pass a Sunday-opening law was defeated, and the reaction compelled the Sunday closing of two thirds of the saloons of the state, which had been wide open in defiance of law. Walla Walla, Tacoma with its 100,000, Seattle with its 250,000 inhabitants, and most of the other cities are hermetically sealed on Sunday.

In Oregon, of the 33 counties, 8 are "dry," and 70 precincts in other counties have abolished the saloon.

California, with its saloons in San Francisco and other cities on the one side and active temperance people on the other, is the scene of a battle in which liquor bills are being defeated and restrictive measures are being adopted.

The Eastern States

Maine is the mother of prohibition. Neal Dow was the father of the Maine law. It was enacted in 1851, repealed in 1856, reënacted in 1858. In 1884 it became a part of the constitution of the state. Two years ago it was only retained by a narrow majority, when Governor Cobb made the canvass and was elected on the issue. Despite illicit selling and encouragement to nullification upon the part of the politicians of both parties, the people of the state acknowledge the benefit of the system. Congressman Littlefield in a recent address referred to the singular material as well as mental and moral thrift of the state under prohibition.

New Hampshire abandoned prohibition in 1902. Six of the 11 cities and 183 out of the 224 towns are "dry." The temperance people are for resubmission.

Vermont abandoned prohibition in 1903. Two hundred twenty-one of the 246 towns have voted "dry," and three fourths of the people live under prohibition. The antisaloon people are for resubmission and prohibition.

Massachusetts has a long list of manufacturing cities which have abolished the saloon, including Lynn, with its 78,000, and Worcester, with its 130,000 inhabitants. Ex-Governor Douglas was active in the campaign in his city of Brockton, which went "dry." If the local-option bill for cities now urged on the legislature should pass, Boston would expel the saloons from large districts in the city limits.

Rum has a strong grip on Rhode Island. Since 1889 the state has been under local option. There are only 16 towns that have abolished the saloon, and 22 towns and cities retain it.

Connecticut has recently secured the enactment of laws that are friendly to the temperance people. There are 90 towns "dry" and 78 "wet" under local option.

New Jersey's liquor law is hostile to the temperance reformers. Charters of some cities allow certain protests, but there is virtually no local

option. There is a tremendous conflict on now by the antisaloon people for local option, which will probably be successful in the near future.

New York is the headquarters for brewers and distillers. There are 30,000 retail liquor dealers in the state. They pay license fees of $19,000,000. The state is under the Raines law, which allows local option in townships. A large number of new towns went "dry" at the last election. The excise laws are much more stringently enforced. A search-and-seizure bill and a bill for local option in cities have been introduced in the present legislature, with a prospect of their passage. The Reverend Dr. C. H. Parkhurst, representing the Society for the Prevention of Crime, has just demanded of Governor Hughes the removal of Mayor McClellan and Police Commissioner Bingham on the charge of their refusal to enforce the excise law closing the saloons of New York City on Sunday. The Antisaloon League and kindred organizations are backing up Dr. Parkhurst in this demand.

Pennsylvania, like New York, is behind most of the states in temperance reform. The Brooks license law is not satisfactory to the antisaloon people. A local-option law asked for by them has been killed in the committees of the legislature, so strong has the whisky power been upon it.

What has caused this Temperance Revolution

There are reasons why the South should take the lead in this prohibition movement. It was necessary to remove the saloon from the negro to save Southern industry and civilization. Booker T. Washington the other day said: "The abolition of the barroom is a blessing to the negro second only to the abolition of slavery. Two thirds of the mobs, lynchings, and burnings at the stake are the result of bad whisky drunk by bad black men and bad white men." Besides, the South is intensely American. In the fourteen southern states there are but 16 foreign-born persons to every 1000 inhabitants. In Ohio, California, Pennsylvania, New York, Illinois, and Wisconsin there are 178 foreign-born persons to every 1000 inhabitants. In the mountain districts of the South, where the foreign-born population is the least in America, there are almost no drinking places. The "moonshiners" hide in some of the mountain dens, but there are not 20 open saloons in the rural sections of the mountains of Virginia, West Virginia, Kentucky, Tennessee, North Carolina, Georgia, and Arkansas. It is not so hard to get the liquor traffic away from so homogeneous a population. The Southern people are sentimental and enthusiastic, and do what they do with an intense enthusiasm. As a rule they have a deep religious instinct and the highest moral ideals. The territory is good ground for prohibition.

But there are reasons deeper than this which have made such local success in the South. The negro question has had nothing to do with prohibition in Maine, Kansas, North Dakota, Oklahoma, Ohio, nor Iowa.

The work of abolishing the saloon meets with the least resistance in the plantation sections of the South and the rural districts of the North; but it is going on in the cities as well. In the manufacturing city of Birmingham (Alabama), Atlanta (Georgia), Knoxville (Tennessee), in many of the manufacturing cities of New England, and in large residential districts of Chicago and other cities the same conflict with the same spirit is being waged.

The present temperance upheaval is the revolt of the American conscience against what it considers to be wrong. The American saloon can blame itself largely for the present opposition to it; it is essentially bad. Aside from the inherent danger of the business under the wisest possible restraints, the liquor dealers of the nation have set themselves to do their very worst to provoke alarm. The saloons are the breeding place of all kinds of vice and crime. In them the thieves, the murderers, ballot-box stuffers, grafters, purchasers of law, and the debauched find their education and protection; and from them the lawless hordes go forth to prey upon society. The only wonder is that the people have stood this menace to our civilization as long as they have.

While it is not universally so, it is too often the case that the saloon fosters and promotes the social evil. The public sentiment is greatly outraged at the intimate relationship between the saloon and the disorderly house. The public is very angry because so many drinking places are gambling hells.

Another thing that has stirred the public against the liquor traffic has been the relationship between the politician and the saloon. No feature of American public life is so abominable and discouraging as this open and notorious copartnership of the liquor traffic with politicians of all parties in the business of crime. It is an astounding fact that most of the great cities of the country are ruled by rum, and have been for a generation or more. Every privilege for every kind of crime is bought and sold for money. Fabulous corruption funds and thousands of the criminal classes are organized to hold up the public and compel it to deliver. Three saloon keepers of Chicago have absolute authority in wards one and eighteen, where the traffic in vice is maintained; and men of their stripe rule in some other wards; so that the political complexion of Chicago is determined by the saloon influence. In New York City a large proportion of the Tammany leaders who determine the policy of their party in the city and state are or have been saloon keepers. In Philadelphia and in some other cities the connection between the saloons and the political leaders of the opposite party is just as marked as it is in Chicago or New York.

The liquor dealers themselves confess to the badness of the present American saloon. Each class is charging the blame on the other. At a meeting of the Brewers' Association at the Waldorf-Astoria in New York City recently the blame was laid at the door of the retail liquor dealers.

It was charged that the saloons, many of them, were filthy dens, and that the business had to be reformed or the people of the country would destroy them. The retail liquor dealers in their conventions have been saying that the brewers, in their greed for money, have multiplied the saloons beyond all reason, holding them down by their mortgages and making it impossible, by the fierce competition which has been forced upon them, to make a living and pay off the mortgages without introducing the disorderly house and gambling rooms as annexes, putting up money for graft, and otherwise breaking the law. The brewers say the fault is with the distillers, the distillers say the brewers are to blame. They both admit the public has a grievance.

It is not only the badness of the American saloon that has caused this revolution, but also the marked awakening of the public conscience against all kinds of wrong, and hence the saloon comes in for its share of rebukes and opposition. The temperance reformers and organizations of the past and present have been exceedingly active, and each without an exception has been an important factor in the great moral upheaval that is shaking down so many drinking places. The Woman's Christian Temperance Union, the Good Templars, the National Temperance Publication Society, the third-party Prohibitionists, the National Reform Bureau, and kindred societies have all been active in their fields; but the one organization which has done more than all others in giving wise direction and successful results to the present temperance revolution has been the Antisaloon League. It was founded at Oberlin, Ohio, in 1893, by the Reverend Howard H. Russell, D.D., a Congregational clergyman and son of an Episcopalian rector, who is now chairman of the National Executive Committee and superintendent of the New York State League.

The institution is compactly organized in forty-four states and territories, with a national, state, and district superintendency. It is interdenominational and omnipartisan. The Reverend Purley A. Baker, D.D., is the national superintendent. The league has conducted itself so wisely and honorably that it has commanded the universal respect of the churches of all denominations, many of the Catholic as well as Protestant. There are few cities or towns in the United States in which there is not a representative of the league in some one or more of the churches on Sunday, presenting the cause and securing help for its promotion. For thirteen years this quiet work has been going on on Sundays, besides that done on week days, and it is not necessary to go very far away from this unified sympathy and action of the Christian churches of America to find the chief cause of this tremendous moral upheaval. There is scarcely a legislature in session this year at which the Antisaloon League does not have some measure or measures unfriendly to the liquor traffic, and the restrictive temperance legislation of most of the states for several years has been handled by official representatives of the Antisaloon League.

Many rich men generously support this organization; but there are 300,000 annual contributors to its campaign fund, which speaks loudly of the popular sympathy and power which it possesses. Many who are not members of any church, or even total abstainers, commend and unite in the work of the league in the interest of law and order and of civic righteousness.

This popular temperance sentiment has expressed itself in legislation at Washington in the removal of the canteen from the army, of drink from soldiers' homes and government buildings, and other measures, and in a bill now before Congress preventing the shipment of liquors into states whose laws prohibit their sale.

Will prohibition prohibit? Relatively, yes. Absolutely, no. Prohibition never does absolutely prohibit any form of crime, — that of murder, theft, arson, forgery, or perjury. The courts and jails all attest the truth of this. The contention of liquor dealers that more rum is sold in a state under prohibition than under license is hardly to be taken seriously, for if it were true, they would be working for prohibition instead of shivering with fear and filling the papers and conventions with alarm at the tidal wave of prohibition and loudly calling for organized help to resist and prevent its destroying them.

You cannot make men good by law, — so many people and papers are saying now. "Yes, you can!" No people on earth can be good without law and order; so good a type of a race as the Anglo-Saxon has to bind himself about with most stringent law to keep from becoming a very bad citizen. Fully one half of all that is good or great in man has had to be beaten into him by authority. Gladstone said that the primary object of law is to make it easier for men to do right and harder for them to do wrong.

Moral and political progress is always along the stages of advances and retreats. How long will this temperance movement continue without a reaction? No one can tell. Very likely till every state in the Union shall have tried the experiment of prohibition by local option or state action. While there are 114,000 more saloons than churches, while the liquor traffic continues to take into its treasury enough money each year to run every department of the federal government, — executive, legislative, judicial, navy, army, post office, treasury, and every other interest, — the whisky men will not surrender without a fierce and long struggle. But the present revolution will result in greatly reduced individual consumption of rum, in the manifest diminution of the sale of liquor, and in the destruction of the American saloon in its present form.

ANOTHER YEAR OF DEFEAT FOR THE AMERICAN SALOON[1]

By Ferdinand Cowle Iglehart

The revolt against the liquor traffic seems to be world-wide. The fight against it in Europe is nearly as fierce as it is in this country. Finland abolished intoxicants by a vote of its Parliament. Iceland adopted national prohibition in September last. The Duma of Russia ordered the removal of the royal eagle from the vodka bottles, and the substitution of the skull and crossbones, the symbols of death, and the word "poison" written in large letters beneath them as a warning to the people. In Paris there are placards placed on the bulletin boards saying that "whoever puts alcohol in his mouth takes out his brains, his money, his health, his happiness." Government statistics in England show a decrease of thirty million dollars' worth of intoxicants in the consumption during the year 1908.

The South swept by a "Prohibition" Wave

The temperance revolution in this country continues with unabated energy. Eleven thousand saloons were put out of business during the year 1907, as many more in 1908, and at that rate of decrease it would require but twenty years to abolish all the saloons of the country.

About eighteen of the twenty millions of the people of the southern states have already outlawed the saloon. In New York City alone there are one thousand more saloons than in all the fourteen southern states, and it looks as though within the coming five years every state in that section would vote the saloon out of existence.

On May 6, 1908, North Carolina followed her sister states of Georgia, Alabama, and Mississippi in the adoption of state prohibition by a popular vote.

The campaign was a notable one, participated in by Governor Glenn, the two United States senators, every member of Congress, all of whom stood against the saloon, securing a majority of 42,000 votes.

The fight for prohibition in 1909 was begun by Tennessee, following the example of her old mother state, North Carolina, passing a bill prohibiting the sale of intoxicants by a vote of 24 to 13 in the Senate, and 62 to 36 in the House. It was vetoed by the governor, and passed over his objection by the same vote in the Senate, and by the loss of but one vote in the House. This bill will go into effect the first day of next July, at which time every saloon in the state will close its doors. A more drastic bill to prohibit the manufacture of intoxicants in the state, which is to take effect on January 1, 1910, was carried in both branches of the legislature, and was passed again over the governor's veto, and is now a law.

[1] From the *Review of Reviews*, May, 1909. Reprinted by permission.

In South Carolina each county having a dispensary will vote on the question of option between the county dispensary and prohibition in August of this year.

Thirty-six of the 46 counties of Florida, including 525,000 of the 650,000 of population, have abolished the saloon. There are only 330 saloons in the entire state, and from the organization of the present legislature it seems probable that state-wide prohibition will be adopted at once.

Louisiana has more than 32,000 square miles of "dry" territory, and 6 entire parishes were placed in the antisaloon license column during the past year.

Fifty-nine out of the 79 counties of Arkansas are "dry," and 1,612,000 of the 1,750,700 of the people in the state are living in territory where the drink traffic is forbidden. There are only 317 saloons in the whole state left, which must give way to the inevitable public verdict against the business.

During the past year 800 saloons were driven out of Texas, and 15 new counties voted "no license." Of the 243 counties 150 are "dry," 66 part "wet," and 25 license the saloon. Two hundred thousand of the 267,000 square miles of the state is "dry" territory, containing a population of 3,000,000 people. State-wide prohibition will be a certainty in the near future.

In Virginia during the past year 400 liquor places were put out of business. Seventy-one of the 100 counties in the state have not a licensed saloon.

The temperance people of West Virginia lost in their battle before the Senate, which recently adjourned, losing two propositions: first the amendment to the constitution, forbidding the manufacture and sale of intoxicating drinks, and also one for county local option. There are 700,000 of the 1,200,000 people of this state who live in territory where the saloon is forbidden. Thirty-three counties out of the 55 in the state are entirely "dry."

In Kentucky one more county has been added to the "dry" column, making 96 out of the 119 counties in the state.

Missouri has made decided progress during the past year. There are now 50 "dry" counties in the state, including their municipalities, while 27 other counties have abolished the saloon under the county-option law, which exempts cities of 2500 population and more from its operation.

Aggressive Campaigning in the Middle West

The fires of prohibition that have been burning in the cotton fields of the South have crossed Mason and Dixon's Line and caught in the meadows, the corn fields and wheat fields of Illinois, Indiana, Ohio, and other northern states, and are burning as fiercely as they have been in the South.

Illinois, the third state in the Union in wealth, population, and importance, never gave its people the benefit of a local-option law until last year, when the people voted in 1300 towns, 1000 of which went "dry."

The temperance movement in Indiana is about as vigorous as in any of the southern states. The Remonstrance law had cleared the saloon from two thirds of the geographical area of the state. Of the 36,300 square miles of territory, 26,170 had been made "dry," and about 1,600,000 of the population out of the 2,600,000 were living in "dry" territory. Governor Hanly called a special session of the legislature in September last, which passed a local-option law with the county as the unit, under which the people are making Indiana a prohibitory state as rapidly as they can get to the polls. Under the old law 20 entire counties had gone "dry." Since last autumn 43 more had joined their company, making 63 of the 92 counties in the state which are entirely "dry," and it is understood that but 1 county of all the 44 recently voting has gone "wet."

It is said that the local-option question got mixed up pretty badly in Hoosier politics, some of the leaders claiming that Watson and the Republican state ticket were beaten on that account. It is likely that the Republican party would have been beaten very much worse if it had undertaken to dodge the issue, which was inevitable. It is charged that the liquor people beat Kearns for the senatorship, and that he, in revenge, prevented the repeal of the local-option bill. But whatever hand the temperance question played in the politics of the state, the people, Democrats and Republicans, went on steadily voting the saloon out of business in the state, and it now seems likely that Indiana may be the next state of the North to adopt state prohibition.

The revolution in Ohio is just as marked as in Indiana, and just as enthusiastic as in any of the southern states. The Antisaloon League, which was born in that state, removed the saloon from large districts in the state by one form of local option or another, but a local-option bill for the county as the unit was passed by the legislature, under whose provisions voting has been going on since last autumn, with results that have startled the nation. The saloon had been removed from 5 entire counties under the previous laws, but since last September 63 counties have voted on the subject, 58 of which have abolished the saloon, and only 9 counties have licensed it; so that, of the 88 entire counties of the state, 63 have gone "dry" and 9 have gone "wet." Many of the contests were notable, especially the one in Clark County, which contains Springfield, with a population of 42,000, polling a vote of almost 19,000 votes, which went "dry" by 139 majority. The legislature this year passed two laws strengthening the local-option law; one preventing agents from soliciting orders for liquor in "dry" territory, the other providing for the appointment of secret-service men in each county in the state to assist the prosecuting attorney in securing evidence of the illegal sale of liquor.

These measures were desperately fought by the liquor men, who were finally overcome.

One year ago there was but one county entirely "dry" in the state of Michigan. Early last month, after one of the fiercest fights in the history of the state, local-option elections were held in 27 counties, 20 of which went "dry," closing at one stroke 600 saloons and 10 breweries.

After a tremendous struggle the Nebraska legislature at its last session passed the Daylight Sale bill, permitting the sale of liquor only between the hours of 7 A.M. and 8 P.M.

The legislature of Iowa on the eve of adjournment passed two bills unfriendly to the liquor interests, one limiting the number of saloons to 1 to 1000 of the population in cities, the other requiring druggists to file with the auditor of the county signed applications for liquor.

The state of Washington has just passed a county-option law, excluding municipalities of 2500 or more, which have a separate option of their own.

The legislature of Idaho has this year passed a very strong local-option law.

Both branches of the legislature of Utah passed a county-option bill, but just at the last of the session, when too late for a remedy, the governor vetoed the bill.

Prohibition was the main issue in the municipal elections held in Colorado, outside of Denver, early in April. The antisaloon party generally was successful.

Local Option in New York and New England

A local-option bill for cities as a whole is pending before the New York state legislature. The present liquor law of the state permits local option for towns, under which elections have been held this year, resulting in a net increase of 30 "dry" towns. About 330 towns in the state are "dry," about 320 "wet," and the rest are part "wet" and part "dry." The Committee of Fourteen introduced a bill at Albany, providing among other things for the opening of saloons in cities of the first class certain hours on Sunday, which was promptly killed in the Senate Committee. Yates County, by a vote on February 23, carried all the towns in its territory against the saloon, and became the first and only entirely "dry" county in the state.

Recent elections in Connecticut have abolished the liquor traffic from 3000 square miles of territory, closing 300 saloons during the year.

Massachusetts has gained 10 municipalities for the "dry" column.

During 1908, 429 saloons were driven out of Rhode Island.

Important Federal Legislation

For several years the temperance people have undertaken to secure an amendment to the Interstate Commerce law, forbidding the importation of intoxicating liquors into territory made "dry" by state legislation, and have failed. On February 17 last there was incorporated into the penal code of the United States the Interstate Liquor Shipment bill, introduced by Representatives Humphreys, of Mississippi, and Miller, of Kansas. It is considered by many the most important temperance legislation since the passage of the Wilson law in 1890. This bill does three things: (1) it prohibits C.O.D. shipments; (2) it prohibits delivery to fictitious consignees; (3) it requires that all packages of liquor for interstate shipment shall be plainly marked, designating the contents and consignee. The bill was in grave danger and would have been killed in the committee, had it not been that Speaker Cannon obstinately demanded its passage and then voted for it upon the floor. This law, while it will not do all that the friends of temperance might desire, will go a long way toward correcting the abuse that the liquor dealers have practiced upon the citizens of the states that have prohibited the drink traffic, and will pave the way for further relief which the people of the states may demand in the future.

The Saloon "Fighting for its Life"

Almost all of the legislatures meeting during the present year have had bills relating in some way to the liquor traffic. Very few of these bills showing any friendliness to the saloon have been allowed to become laws. A recent editorial in *Bonfort's Wine and Spirit Circular*, written by T. M. Gilmore, the president of the National Model License League, expresses the opinion of many liquor dealers upon the present temperance revolution. It says:

> The Antisaloon League is backed by able men and plenty of money. In the last eighteen months the business we represent has been outlawed in the states of Oklahoma, Georgia, Alabama, Mississippi, North Carolina, and Tennessee, and it is now facing destruction in West Virginia, Texas, Kentucky, Arkansas, Utah, and Idaho. The saloon is fighting for its life in practically every state in the Union.

The liquor dealers strenuously insist that "prohibition does not prohibit," and their literature, which is scattered broadcast among the church people as well as others, claims the failure of the prohibitory laws in the states having them. They insist that the more the traffic is prohibited, the more liquor is consumed, and that hypocrisy and disrespect for law are fostered; and yet the states that have adopted prohibition seem to be very well pleased with their legislation, and none of them have surrendered to license, and other states in pretty rapid succession are joining their ranks.

In Maine, Kansas, and North Dakota, at their last election, governors were chosen on platforms not only declaring for state-wide prohibition, but for a rigid enforcement of the prohibitory law; while in Georgia, Oklahoma, and Alabama the antisaloon forces have held their own, preventing legislation which would in any way weaken the state prohibitory laws.

Strength of the Economic Argument

No great result can come from a small cause. There are powerful causes that are putting the saloon out of business. More and more the economic argument is influencing voters to abolish the saloon. The man who frequents the saloon is not so strong in body, nor intellectually so keen, nor professionally or industrially so efficient as the man who does not. A man who has no scruples on the subject, but has good common sense, soon discovers that he is handicapped in the heated competition of life when he becomes a patron of the saloon.

The New York Central, the Lackawanna, the Pennsylvania, the Baltimore and Ohio, the Wabash, the Rock Island, the Great Northern, and other railroad systems have adopted the following rule: "The use of intoxicants by employees, while on duty, is prohibited. Their habitual use, or the frequenting of places where they are sold, is sufficient cause for dismissal." The Michigan state law will not permit a man who is not a total abstainer to have anything to do with the running of trains. The premium on temperance in railroad circles is so great that 25,000 employees of the Northwestern Railroad signed a pledge of total abstinence at one time.

Business houses generally discriminate against the drinker in the employment of men. The United States Commissioner of Labor sent a note of inquiry to 7000 concerns employing labor; 5363 of them responded that they took the drink question very much into account in hiring men, and that they had to be the more careful in selecting responsible help because the law held them liable for injuries caused by accident. The young man of ambition and hope who wants to get into a good place and succeed in it knows full well that he must stay away from the saloon. This business argument sends hundreds of thousands of employees into the ranks of those who are fighting the traffic.

The people paid last year a billion dollars for intoxicating drink, $108,000,000 more than for all the necessaries of life, and it is a protest against this colossal material waste, and a desire to divert some of the drink money to better uses, that has prompted many to vote "no license" in the campaigns. The billion dollars paid over the counter for drink for the year is only about a half of the material damage the traffic causes, requiring institutions to be maintained by the public.

The large amounts of money paid into the treasuries of states and municipalities by the liquor dealers are no compensation for the material

as well as the moral waste in the community, and while there are many friends of law and order who vote for license because they think the saloon ought to be made to pay a part of the price of its public injury, the people are getting to believe more and more each year that the damage of the saloon is too great, and they are unwilling to tolerate it and are voting "no" on the proposition to permit it.

The sentimental and moral argument for the removal of the saloon is more powerful with the average voter in the "wet and dry" campaigns than the economic one, strong as it is.

The liquor men have untold wealth at their disposal; the ablest minds in the nation are employed as their attorneys; they have lobbyists at the sessions of every state legislature and national Congress; they have politicians of both parties in every state and city who can be relied upon to promote their interests; they have an army of 200,000 saloon keepers, and more than that of loyal patrons; millions of dollars are spent in advertisements and in their literary department each year, and their fight will be desperate and prolonged. But the self-interest and conscience of the nation are against them, and unless there shall be some reformation in the liquor traffic, which seems now impossible, or if there should occur no disagreement or disintegration among the temperance forces now so united, it is likely that within a generation the saloon, as we see it to-day, will have passed away.

VIII

ELECTIONS AND NOMINATIONS

THE MULTIFARIOUS AUSTRALIAN BALLOT[1]

By Philip Loring Allen

A standard political reference book is authority for the statement that forty-two of the forty-six states of the American Union use the Australian ballot in their elections. If this is true, then the election machinery of Australia would seem to be quite as varied and remarkable as the flora and fauna of that continent. As a matter of fact, the expression "Australian ballot" is used here in two senses. In a restricted sense it is applied to the particular form which America borrowed from Australia, and which the state of Massachusetts led the way in adopting in 1889. But it is also used to designate any secret ballot printed and furnished by the state. In this broader significance it is applied to forms which have scarcely another single characteristic in common.

The plan of voting which was abolished in all but a few of the states during the ballot-reform movement of the early nineties was substantially that which most clubs and associations use for electing officers, and corporations in choosing directors. A ballot was simply a piece of paper bearing the names of the persons voted for and the various offices to be filled. Anybody could print such ballots and persuade as many voters as he could to cast his particular kind, though as a matter of course the party organizations prepared the vast majority of those voted. Three southern states have never abandoned the old system and still allow the casting of unofficial ballots, which may be "written or printed or partly written and partly printed." The average Georgian or South Carolinian deposited in November of 1906 a ballot prepared for him by the local representative of the Democratic party, exactly as he may have cast in one of the New York insurance company elections a ballot prepared for him by the International Policyholders' Committee or his own insurance agent.

The fact that most American voters were accustomed to voting a whole party ticket at a single operation explains how the true Australian ballot came to be modified in this country. The ballot reformers

[1] From *North American Review*, May, 1910. Reprinted by permission.

proposed a method by which a thick-and-thin Republican, for example, should, on election day, vote first for a Republican governor, then for a Republican lieutenant governor, then for a Republican Secretary of State, and so on, until he finished his ballot by voting for a Republican pound-master. It was very plausible for the politicians in communities accustomed to the "vest-pocket ballot" to say: "No; we like your plans for a secret vote. We like your plans for purifying the polls and for insuring a fair count. But we do not like your idea of scattering the nominees of a party all over a blanket sheet. We will adopt your safeguards and we will make the ballot official, but we will follow the form of our old familiar party slips, simply arranging them side by side on a blanket sheet like yours."

In John Fiske's "Civil Government," published in 1892, facsimiles were printed of the new Massachusetts ballot and the adaptation of it as used in Kansas. The former placed the candidates for each office within a "box" or wide printed border by themselves, arranged in alphabetical order, each followed by the name of the party nominating and a space in which the voter was to make his "X" mark. The Kansas ballot, on the other hand, assembled the names of each party's nominees, from the highest down, in a column headed by the party name in large letters. In all other respects the ballots were on an exact parity. No method was provided for voting all the names in one of these party columns *en bloc*. Just as in Massachusetts, the elector had to make his mark for every candidate of his choice, whether these were all in the same column or selected from several columns. The difference was then in typography rather than in principle.

The real divergence came when the party-column ballot was again modified by the addition of a circle or square at the head of each column, by means of which a "straight ticket" could be voted at a single operation. The emblems which in many states have also been placed at the head of the party columns, though often criticized, serve a perfectly legitimate purpose as a guide to the illiterate.

Thus originated the two chief forms of ballots used in this country. They are illustrated in Figures 1 and 2, which are not facsimiles of the styles used in any states, but embody the characteristic features. The first makes no concession to the party beyond designating the organization which placed each candidate in nomination. The smallest of minor parties, by nominating a candidate named Abarbanell, gets his name in the most conspicuous place. The district leader and the Good Government Club member who wants, possibly, a Republican President, a Democratic governor, an Independent district attorney and a Prohibition sheriff are put to precisely the same amount of time and trouble in voting. The second form (Figure 2) is frankly partisan. "Most men are adherents of some party," say the advocates of this ballot, "and their right to vote as they wish with the least possible trouble is paramount."

This style of ballot always puts the man who goes outside a single-party column at a disadvantage, — how much of a disadvantage depends upon the rule for marking. To illustrate, in New York City four years ago Mr. Jerome, an Independent candidate for district attorney, whose name stood by itself in the last column of the ballot, was seeking votes among the adherents of all three of the important city tickets. His supporters

FIGURE 1

Governor		Mark One
Charles T. Apgar	Prohibition	
Samuel E. Briggs	Socialist	
Arthur Fuller	Democratic	
Henry Zabriskie	Republican	

Lieutenant Governor		Mark One
Howard Arnold	Republican	
Clarence P. Snyder	Socialist	
George Van Derzee	Prohibition	
John W. Young	Democratic	

The Massachusetts-Australian ballot. All candidates on an absolute equality.

FIGURE 2

Republican		Democratic	
o		o	
	Governor Henry Zabriskie		Governor Arthur Fuller
	Lieutenant Governor Howard Arnold		Lieutenant Governor John W. Young
	Secretary of State Edward Marshall		Secretary of State Steven Byrne
	State Treasurer S. Frederick Crocker		State Treasurer Timothy Gregg

Essential features of party-column ballot as used in nearly half of the states, including New York.

claimed that a mark in any one of the straight-ticket circles and an additional mark opposite Mr. Jerome's name was a legal vote for him and also for all the candidates in the chosen-party column except the nominee for district attorney. Tammany contended, however, up to the eve of election, that the only legal way of splitting a ticket was to mark every favored candidate separately. If the Jerome nominators were correct, and the party circle was for the use of split-ticket as well as straight-ticket voters, then two marks would be enough to vote for Jerome and one of the party tickets. If Tammany was right, — and the rule for which it contended prevails in several states, — then the same vote would require the marking of sixteen names. By no construction

FIGURE 3

To vote a straight party ticket, write within the blank space immediately hereunder the name of the party you wish to vote for.

I hereby vote a straight.....ticket except where I have marked opposite the name of some other candidate.

If you have voted a straight ticket above and place a cross mark (×) opposite any name below, such cross mark (×) will be counted for that candidate, and the vote cast for the candidate on the straight ticket for the same office will not be counted, etc.

For Governor		Vote for One
Charles T. Apgar	Prohibition	
Samuel E. Briggs	Socialist	
Arthur Fuller	Democrat	
Henry Zabriskie	Republican	
For Lieutenant Governor		**Vote for One**
Howard Arnold	Republican	
Clarence P. Snyder	Socialist	
George Van Derzee	Prohibition	
John W. Young	Democrat	

The Colorado plan. In the election contest of 1904 experts testified that they could identify individual "secret" ballots by the handwriting in which the party name was inserted.

of the law, however, could a Jerome voter be put on an exact equality with the strict partisan.

These are the differences between the "reform" ballot and the avowedly partisan sort. There exists, however, a third class of ballots which are neither one thing nor the other, and these are in some respects the most interesting of all. Wherever there has been popular confusion between the essentials and the nonessentials of ballot reform, politicians have taken advantage of that confusion to pass laws granting the shadow and not the substance. They want to discourage straying from the party fold. Consequently they want to continue the premium on perfect regularity. It may be that civic organizations are demanding the adoption of a nonpartisan ballot. "What is it you want?" ask the politicians. Suppose the reformers answer as follows: "Abolish the party column. Abolish the party emblem. Place all candidates' names under the various offices. Arrange them in alphabetical order. Nothing less will satisfy us." Every one of these things may be granted without really conceding anything of value to the Independents if only a few modifications in the interest of "convenience" may be made at the same time. Pennsylvania and Colorado afford excellent examples of ballots made in this way. Pennsylvania uses the Massachusetts ballot, the "pure Australian type," with only the addition of a set of party squares at one side of the sheet. This does not look in the least like the New York ballot, yet the straight-ticket voter is favored in just the same way by being relieved entirely of the necessity for scrutinizing and marking separately his various candidates. In Colorado (Figure 3) the same result has been secured in an even more original fashion. This state also has what looks like a model ballot, but it is robbed of its virtue by the printed line at the top which makes the voter declare: "I hereby vote a straight ———— ticket, except where I have marked opposite the name of some other candidate."

It has thus been easy to devise official ballots which, with the general appearance of the pure Australian form, possess none of its advantages. But this has not been the only opportunity of the ballot tinkers. They can also turn out a party-column ballot which does not possess even the good qualities of that openly partisan instrument. In all the forms thus far mentioned the voter has the privilege, under some regulations, of voting for any candidate named on the ballot by simply making a mark opposite that candidate's name. Even this privilege can be taken away, however. The Maine ballot (Figure 4) illustrates how it may be done. It will be noticed that, while there is a huge party square at the head of each column, there are no small marking spaces opposite the individual names. This is because the Maine law permits no skipping from one column to another. The voter designates whichever column he pleases, but all his voting must be done in that column. The name of Stokes may be next to that of Freeman, but if the man who has marked in the Republican square wants a Democrat for sheriff, he must erase

Freeman's name and insert Stokes's just as if it were not on the ballot at all. In spite of the use of the blanket sheet, the process of ticket splitting is here exactly the same as in the states like Missouri, where there is a separate official slip for each party, and the voter, having chosen one slip, must alter it, if he prefers some candidate of another party, by "pasters" or the writing in of the name.

From ballots designed to make difficult the voting of any but a straight party ticket, it is a natural step to ballots designed to make difficult the voting of any but one particular party ticket. In this direction also American ingenuity has done much with the primitive Australian form. The party emblem has been mentioned as a legitimate aid to the illiterate voter. Its absence is equally an aid to the party which has the larger proportion of members who can read and write. Maryland, a state which has a large negro population and no educational qualification for voting, has the pure Massachusetts ballot, alphabetical order

FIGURE 4

REPUBLICAN	DEMOCRAT
For Governor Henry Zabriskie of Rockland	For Governor Arthur Fuller of Saco
For Representative to Congress Levi G. Hinds of Kennebunkport	For Representative to Congress Peter A. Ferguson of Berwick
For Clerk of Courts Nathaniel Hart of Eliot	For Clerk of Courts William Perkins of Skowhegan
For Sheriff Robert C. Freeman of Eastport	For Sheriff T. Jefferson Stokes of Dill

A party-column ballot which makes it as troublesome to split a ticket as if the names of alternative candidates were not on the sheet at all.

and all, except in eleven counties, where even the party designation is dropped and the several candidates stand simply as individuals. Yet this outwardly impartial arrangement is the much execrated "trick ballot." Perfectly simple to any one who can read and write and knows the names of the candidates he means to vote for, these styles have been regarded simply as puzzles by the illiterate negroes and as subjects for party trickery by many of the politicians. In 1904 nearly four thousand Republicans mistook the square opposite the name of their first presidential elector for the square which voted all eight *en bloc*, and on this account forfeited the other seven presidential votes to the party really in the minority. All manner of stories are told of the devices resorted to under this perverted ballot law. The names of candidates have been shuffled without warning so that the ignorant voter could not be told to vote according to their position. Names have been printed in old English and other unusual type. The "Repudiation" party was extemporized and put candidates in nomination in order to bewilder negroes who had been laboriously taught to recognize the word "Republican." One Maryland Congressman is said to have established schools in which negro voters were taught to recognize his Christian name, "Sydney," by the two "ox yokes," — the y's, — and just as he had succeeded, another "Sydney" was nominated against him by petition so there would still be confusion.

The favorite plan for making one party vote sure and mixing up all the others is simply to eliminate all emblems and designations and then place the chosen party's nominees in every instance first. It then requires neither intelligence, literacy, nor care to vote that ticket. All three are needed to vote any of the others. As an extreme example, the official ballot used in Florida at the last presidential election (Figure 5) may be cited. There were five presidential electors then to be chosen and four parties made nominations. The names were printed in small type, one below the other, with no mark whatever to indicate where one party's group ended and the next began. It was easy for a Democrat to put crosses opposite the first five, but the Populist had to begin with number eleven and check to number fifteen inclusive. Nearly half the Populists and Socialists in Florida and about one fifth of the Republicans failed to mark their electors correctly as a result of this blind arrangement.

Given the complete election returns of ten or twenty or thirty states, it would be perfectly possible, without any previous knowledge of the several laws, to separate those using nonpartisan ballots from those using partisan ballots. The latter would show in almost all cases a uniformity which is the delight of the party manager. The total vote for one office is almost the same as the total vote for every other office. Add together the figures for all the Republican candidates for the assembly and you have very nearly the Republican vote for governor. Only some very strong motive will produce any wide discrepancy between the pluralities

FIGURE 5

OFFICIAL BALLOT

General Election, Nov. 8th, A.D. 1904
Precinct No. 12, Leon County, Florida
Make a cross mark (×) before the name of the candidate of your choice

FOR REPRESENTATIVE IN CONGRESS
3d CONGRESSIONAL DISTRICT

Vote for One

- William B. Lamar
- Geo. R. Smith
- Lambert M. Ware

PRESIDENTIAL ELECTORS

Vote for Five

- H. P. Bailey
- J. E. Grady
- T. A. Jennings
- A. B. Newton
- F. B. Stoneman
- C. F. Buffman
- A. E. Dole
- Daniel L. McKinnon
- Thomas R. Moore
- Geo. K. Robinson
- Alonzo P. Baskin
- J. S. Whitney
- E. D. Baker
- Geo. W. Holmes
- G. A. W. Wendell
- A. V. Putman
- M. F. Zeller
- William R. Shields
- A. M. Cushman
- John M. Stanley

FOR GOVERNOR, STATE OF FLORIDA

Vote for One

- Napoleon B. Broward
- W. R. Healey
- M. B. Macfarlane

Part of Florida ballot in 1904, when nearly half of the Populist and Socialist voters failed to mark their presidential electors correctly.

of candidates on the same ticket. In states of the other class all manner of fluctuations will be found, irregularities that correspond exactly to the variations of popular feeling and interest. A popular candidate with a good record will run, as a rule, considerably farther ahead of an unpopular colleague with a bad record than he will in the states using the party circle. Not so many electors will vote on the unimportant offices as on the important.

It is in such a comparison that the real affinities of the "compromise" ballots here described betray themselves. A ballot of the party-column style, but without the party circles, such as Kansas abandoned but Montana has still, affects the returns in just the same way as that of Massachusetts. On the other hand, when an "alphabetical" ballot has had party circles added, the statement of vote will present just the same parallelisms and equalities which indicate the workings of the familiar party-column type.

There are several state legislatures in which ballot reform is a prominent issue. In every one there will doubtless be a proposal to adopt the pure Australian ballot. Then will arise some one to say: "Give us perfect equality between the independent voter and the party man by all means, but do it by making it easier to vote a split ticket, not harder to vote a straight one." As a piece of practical advice this familiar counsel is altogether meaningless. If Mr. A wants to vote for a single candidate outside his own party, he cannot, under any conceivable ballot law, express his purpose with less than two marks, and so long as he must make two marks, he is not on an equality with Mr. B, who can vote his ticket with one. If only the absolute and not the relative convenience of voting is to be considered, it may be admitted at once that the party-column ballot which Governor Hughes advised the legislature of New York to abolish makes it as easy to split a ticket as any form that can be devised. The only trouble is that it makes straight-ticket voting still easier. If equality between them is worth securing, it can be practically secured by taking away the straight-ticket circles, whether the ballot that is left has the group by offices or the party column, emblems or no emblems.

THE SHORT BALLOT[1]

(A NEW PLAN OF REFORM)

By Richard S. Childs

Do you know that ours is the only habitually misgoverned democracy? Other democracies, Canada, and the English, French, and German cities, are generally well governed, many of them splendidly governed. Their councils and legislatures stay clean for decades automatically without need for public uprisings to clean them out. True, they sometimes suffer

[1] A pamphlet published by the Short-Ballot Association.

from graft, but it is local, haphazard, and unorganized, like graft in business life. But with us misgovernment is universal and ever present. Every state and every city is constantly at war with it. The brand-new city of Gary will begin to grapple with it as soon as there is an election. And the success of the forces of righteousness is always temporary, like sweeping back flooding water with a broom. We say truly, "A reform administration is never reëlected." Good administration is actually abnormal in American cities and states. Maladministration is the normal.

This condition, unique among democracies, indicates the existence of some peculiarity in our system of government as the underlying cause.

Starting at the broad base of our structure, the voters, we notice one unique phenomenon which is so familiar to us that we usually overlook it entirely; that is, *our habit of voting blind.* Of course intelligent citizens do not vote without knowing what they are doing. Oh, no! You, Mr. Reader, for instance, you vote intelligently always! Of course you do!

Confidential Census

Do you know the name of the new state treasurer just elected?	*Yes*, 13%
Do you know the name of the present state treasurer?	*Yes*, 25%
Do you know the name of the new state assemblyman for this district?	*Yes*, 30%
Do you know the name of the defeated candidate for assemblyman in this district?	*Yes*, 20%
	(*Knew both of above*, 16%)
Do you know the name of the surrogate of this county?	*Yes*, 35%
Do you know the name of your alderman?	*Yes*, 15%
Do you know whether your alderman was one of those who voted against the increase in the police force last year?	*Yes*, 2%
Are you in active politics?	*Yes*, 4%

The intelligence (?) of the "three-story-brown-stone-house vote" in the most independent assembly district in Brooklyn. Data collected immediately after election, 1908.

This unique and incurable ignorance of the American voter is the *raison d'être* of "machine" politics.

In other democracies (England, Canada, etc.) there are but few elective officers, and every voter knows them all. There is no such ignorance, hence no "machine" rule, no "ward politicians," and no organized corruption.

But whom did you vote for for surrogate last time? You don't know? Well then, whom did you support for state auditor? for state treasurer? for clerk of the court? for supreme court judge? And who is your alderman? Who represents your district at the state capitol? Name, please, all the candidates you voted for at the last election. Of course you know the president and the governor and the mayor, but there was a long list of minor officers besides. Unless you are active in politics I fear you flunk this examination. If your ballot had by a printer's error omitted the state comptroller entirely, you would probably not have missed it. You ignored nine tenths of your ballot, voting for those you did know about and casting a straight party ticket for the rest, not because of party loyalty, but because you did not know of anything better to do. You need not feel ashamed of it. Your neighbors all did the same; ex-President Eliot of Harvard, the "ideal citizen," confessed in a public address recently that he did it too. It is a typical and universal American attitude. We all vote blind. Philadelphia has even elected imaginary men. The intelligence of the community is not at work on any of the minor offices on the ballot. The average American citizen never casts a completely intelligent vote.

This is not all the fault of the voter. To cast a really intelligent ballot from a mere study of newspapers, campaign literature, and speeches is impossible, because practically nothing is ever published about the minor candidates. And this in turn is not always the fault of the press. In New York City the number of elective offices in state, city, and county to be filled by popular vote in a cycle of four years is nearly five hundred. In Chicago the number is still greater. Philadelphia, although smaller than either city, elects more people than either. No newspaper can give publicity to so many candidates or examine properly into their relative merits. The most strenuous minor candidate cannot get a hearing amid such clamor. And the gossip around the local headquarters being too one-sided to be trusted by a casual inquirer, a deep working personal acquaintance with politics, involving years of experience and study, becomes necessary before a voter who wants to cast a wholly intelligent ballot can obtain the facts.

Plainly the voter is overburdened with more questions than he will answer carefully, for it is certain that the average citizen cannot afford the time to fulfill such unreasonable requirements. The voters at the polls are the foundation of a democracy, and this universal habit of voting blind constitutes a huge break in that foundation which is serious enough to account for the toppling of the whole structure, provided we can trace out a connection between this as a cause and misgovernment as the effect.

No one will deny that if nine tenths of the citizens ignored politics and did not vote at all on election day, the remaining tenth would govern.

And when practically all vote in nine-tenths ignorance and indifference, about the same delegation of power occurs. The remaining fraction, who do give enough time to the subject to cast an intelligent ballot, take control.

That fraction we call "politicians" in our unique American sense of the word. A "politician" is a political specialist. He is one who knows more about the voter's political business than the voter does. He knows that the coroner's term will expire in November, and he contributes toward the discussion involved in nominating a successor, whereas the voter hardly knows a coroner is being elected.

The politicians come from all classes and ranks, and the higher intelligence of the community contributes its full quota. Although they are only a fraction of the electorate, they are a fair average selection, and they would give us exactly the kind of government we all want if only they could remain free and independent personal units. But the impulse to organize is irresistible. Convenience and efficiency require it and the "organization" springs up and cements them together. Good men who see the organization go wrong on a nomination continue to stay in and to lend their strength, not bolting until moral conditions become intolerable. Were these men not bound by an organization with its social and other nonpolitical ties, their revolt would be early, easy, and effective, and every bad nomination would receive its separate and proportionate punishment in the alienation of supporters.

The control of an active political organization will gravitate always toward a low level. The doors must be open to every voter, — examination of his civic spirit is impossible, — and greed and altruism enter together. Greed has most to gain in a factional dispute and is least scrupulous in choice of methods. The bad politician carries more weapons than the politician who hampers himself with a code of ethics one degree higher. Consequently corruption finally dominates any machine that is worth dominating and sinks it lower and lower as worse men displace better, until the limit of public toleration is reached and the machine receives a setback at election. That causes its members to clean up, discredit the men who went too far, and restore a standard high enough to win, — which standard immediately begins to sag again by the operation of the same natural principle.

Reformers in a nearsighted way are constantly endeavoring to maintain pure political organizations and reëlect reform administrations. Suppose, however, that the Citizens' Union of New York, which is at present sincerely bent on improving the condition of politics, should succeed in carrying the city for its tickets several times in succession. After the first election, small political organizations which had aided toward the victory would rush in, clamoring for their share of the plunder. For a term or two the reformers might be able to resist the pressure.

Nevertheless the possession of power by their party would attract the grafters[1]; they would find themselves accepting assistance from men who were in politics for what there was in it, — men who wanted to use the power and patronage that lay at hand unutilized, — and those men would in time, working within the Union, depose the original heads of the party and substitute "more practical" leaders of their own kind, until in time the Citizens' Union would itself need reforming.

This was exactly what happened to Tammany Hall, which was clean at the beginning.

Theoretically there is always the threat of the minority party which stands ready to take advantage of every lapse, but as there is no debate between minor candidates, no adequate public scrutiny or comparison of personalities, the minority party gets no credit for a superior nomination and often finds that it can more hopefully afford to cater to its own lowest elements. In fact, it may be only the dominant party which can venture to affront the lowest elements of its membership and nominate the better candidate.

The essence of our complaint against our government is that it represents these easily contaminated political organizations instead of the citizens. Naturally! When practically none but the politicians in his district are aware of his actions or even of his existence, the officeholder who refuses to bow to their will is committing political suicide.

Sometimes the interests of the politician and the people are parallel, but sometimes they are not, and the officeholder is apt to diverge along the path of politics. An appointment is made, partly at least, to strengthen the party, since the appointee has a certain following. A bill is considered not on its simple merits but on the issue, "Who is behind it?" "If it is Boss Smith of Green County that wants it, whatever his reasons, we must placate him or risk disaffection in that district." So appointments and measures lose their original and proper significance and become mere pawns in the chess game of politics which aims to keep "our side" on top. The officeholders themselves may be upright, bribe-proof men, — they usually are, in fact. But their failure to disregard all exigencies of party politics constitutes misrepresentative government, and Boss Smith of Green County can privately sell his influence if he chooses, whereby the public is in the end a heavy sufferer.

Thus the connection between the long ballot and misgovernment is established: so long as we intelligent citizens, by voting the long ballot blindly, continue to intrust large governing power to easily contaminated organizations of political specialists, we must expect to get the kind of government that will naturally proceed from such trusteeship.

Every factor in this sequence is a unique American phenomenon. The

[1] Mr. Cutting, the head of the Union, announced, in anticipation of the 1909 municipal election, that the Union did not desire a big enrollment on account of the inevitable contamination it involved.

long ballot with its variegated list of trivial offices is to be seen nowhere but in the United States. The English ballot never covers more than three offices, usually only one. In Canada the ballot is less commonly limited to a single office, but the number is never large and includes only offices that are of such importance as to attract close scrutiny by the public. To any Englishman or Canadian our long ballot is astonishing and our blind voting appalling. A Swiss would have to live four hundred years to vote upon as many men as an American undertakes to elect in one day. The politicians as a professional class, separate from popular leaders or officeholders, are unknown in other lands, and the very word "politician" has a special meaning in this country which foreigners do not attach to it. And government from behind the scenes by politicians, in endless opposition to government by public opinion, is the final unique American phenomenon in the long ballot's train of consequences.

The blind vote, of course, does not take in the whole ballot. Certain conspicuous offices engage our attention and we all vote on those with discrimination and care. We go to hear the speeches of the candidates for conspicuous offices, those speeches are printed in the daily papers and reviewed in the weeklies, the candidates are the theme of editorials, and the intelligent voter who takes no part in politics votes with knowledge on certain important issues.

In an obscure contest on the blind end of the ballot merit has little political value, but in these conspicuous contests, where we actually compare man and man, superior merit is a definite asset to a nominee. Hence in the case of an obscure nomination the tendency is automatically downward, but in a conspicuous nomination the tendency is upward.

Accordingly, while we elect aldermen who do not represent us, and state legislatures which obey the influences of unseen powers, we are apt to do very well when it comes to the choice of a conspicuous officer like a president, a governor, or a mayor. For mayor, governor, or president we are sure to secure a presentable figure, always honest and frequently an able and independent champion of the people against the very interests that nominated him. We are apt to reëlect such men, and the way we sweep aside hostile politicians where the issue is clear shows how powerfully the tide of our American spirit sets toward good government when the intelligence of the community finds a channel; witness Roosevelt, Taft, Hughes, Deneen, Folk, and a host of mayors.

The "town meeting" has often been pointed to as an instance of democracy at its best. A village always governs itself in close accordance with the desires of its people. New England selectmen are the finest men in town. That is because every voter knows personally the character of the candidates and elects with knowledge, registering his independent personal opinion on every part of his ballot. Such an assemblage could elect a hundred men at one sitting and do it well and wisely. It comes outside the range of this discussion, but it illustrates the truth,

that when the electorate is sufficiently informed to have an opinion on personalities, that opinion is normally productive of good government.

The success in western states of the direct election of United States senators is another proof of the principle that any conspicuous office where the voters come to know their man is beyond the control of corruptive forces.

Washington, D. C., is governed by a board of three men appointed at long intervals by the federal government. The inhabitants of the District have no votes. Surely here is a place to find an inert bureaucracy consulting its own comfort first and the people only by courtesy. But, on the contrary, these three men, made conspicuous before the people by their fewness and importance, are more sensitive to public opinion than elected officers in other cities.

Sometimes there is rank misgovernment in a conspicuous office, as when Van Wyck ruled New York City; but, as is rather usual at such times, a reform wave followed and his party was punished by a defeat at the polls. Since then Tammany has temporarily conceded the conspicuous offices to the people, nominating thereto men of independent character and even accepting two who had already been nominated by the reformers. It has been content with graft from borough presidents, the aldermen, and its friends in the lower grades of the departments.

Misgovernment is secure only in the minor offices, in the shadowy places where the spot light of publicity rarely wanders. When the rats venture out of these obscurities into the blazing light, it is to nibble the cake cautiously, and always with timid eyes upon that dread giant, the public, ready to scamper if he stirs. If, growing confident from long immunity, they become too bold and noisy, punishment, clumsy but heavy, suddenly swoops upon them.

And so in these conspicuous offices — those on which we do *not* vote blind — we secure fairly good government as a normal condition, considering that the organized and skillful opposition which always faces us occupies a position of great strategic advantage in possession of the nominating machinery.

We cannot hope to teach or force the entire citizenship to scrutinize the long ballot and cease to vote blind on most of it. The mountain will not come to Mahomet; Mahomet then must go to the mountain. We must *shorten the ballot* to a point where the average man will vote intelligently without giving to politics more attention than he does at present. That means making it very short, for if it exceeds by even a little the retentive capacity of the average voter's memory, the "political specialist" is created.

A voter could remember the relative merits of probably about five sets of candidates, and could keep that many separate contests clear in his mind, but he would probably begin to vote blind on some of the names if the number were more than five. Also we must take all unimportant

offices off the ballot, since the electorate will not bother with such trifles whether the ballot be short or not. Why indeed should fifty thousand voters all be asked to pause for even a few minutes apiece to study the relative qualifications of Smith and Jones for the petty $1000-a-year post of county surveyor? Any intelligent citizen may properly have bigger business on his hands!

To be pictorial, let us see how a revised schedule of elections might look if we put into the realm of appointive offices as many as possible of those which we now ignore. All country offices, many city positions, and the tail of the state ticket would thus be disposed of and the ballots might look something like this: (New York state titles)

First Year	Second Year	Third Year	Fourth Year
President and Vice President, four years	Governor, four years	Congressman, two years	State senator, four years
Congressman, two years	State assemblyman, two years	Mayor, four years	State assemblyman, two years
City councilman, two years		City councilman, two years	

This is merely organizing the state and city as simply as the federal government. There is endless room for discussion on the details and many other arrangements could be devised. This schedule provides for every office which must be kept within the realm of politics. It provides short ballots which every man would vote intelligently without calling on a political specialist to come and guide the pencil for him.

On such a short-ballot basis the entry of our best men into public life becomes possible. To-day the retired business man, for instance, who is willing to devote his trained mind and proven executive ability to the service of his city finds it difficult to enter public life even as a humble alderman. He cannot win as an independent, for the voters do not distinguish his voice in the political hubbub. He must get his name on the ticket of the dominant party, which can elect him, regardless of whether he makes a fierce campaign or remains silent on every issue. In seeking this nomination direct primaries will help him a little, but in the confusion attending the making of nominations for a multitude of offices, he is again unable to attract much attention, and the "machine," swinging its solid blocks of well-drilled voters to the support of some loyal old-time pillar of the "organization," is likely to defeat him, despite his manifest superiority of character. His only hopeful resort is to go down into the unfamiliar and uncongenial shaded underworld of ward politics, kotow

to district leaders and captains whose social and business standing is perhaps inferior to his own, and satisfy their queries, "What have you done for the party?" and "What will you do for us?" Such procedure being at least distasteful and probably stultifying, his activities turn toward philanthropies and recreations. The city has thus refused his proffered services; has turned away the man who considered the office as an opening for civic usefulness, in favor of one who probably wanted it as a good job.

But if he be conspicuous as an important and almost solitary figure before his prospective constituents, such a man can easily make the voter listen and consider, and his superior merit will be an all-important asset to him. The hostile politician who prates of "regularity" will find the voter replying with facts regarding the personality and principles of the candidate, and the discussion shifts to a new level. If the politician can win over the voter on that level, well and good. That is leadership, not bossism, and is unobjectionable.

After such an election this conspicuousness will continue, encouraging good behavior in office. The legislator will fear public indignation, because his constituents, damning a measure, will also damn him specifically for his part in it. Likewise, if deserving, he can get popular support over the heads of any political coterie whom he ventures to disobey.

It may be objected that to take the minor offices off the state ticket, for instance, and make them appointive by the governor would be giving too much power to the governor. Well, somebody, we rarely know who, practically appoints them now. There are other answers, but that one is sufficient.

How an overdose of democracy creates oligarchy is illustrated in Tammany Hall, which would appear to be, in its form of internal government, the most perfect democracy conceivable. But the primary ballot contains from three hundred to a thousand names and bossism is thereby intrenched absolutely.

Broadly speaking, the proposal to make a drastic reduction in the amount of electing to be done is not a new idea historically, but is merely a reversion to original principles. In the early days of the republic there was no such multiplicity of elective offices as now, and until the thirties there were no "machines" of the modern type and no professional politics. Then the wave of Jacksonian democracy swept the country with a new and then unfeared doctrine of rotation in office. For the sake of rotation many administrative offices were made elective, the ballots became too long to be written by hand by the voter, — too long to be even comprehended by the voter, — and the "political specialist" came into existence as a necessary intermediary between the people and their officials.

Fighting misgovernment now is like fighting the wind. We must get on a basis where the good intentions of the average voter find intelligent expression on the entire ballot, so as to produce good government as a normal condition, i.e. good government which regularly gets reëlected as

a matter of course by overwhelming majorities without a great fight. Impossible in this country? No. Galveston has it, with its government by a Commission of Five. This commission has without scandal carried through tremendous public improvements (raising the ground level to prevent another flood), and at the same time has reduced the public debt and the tax rate. That is good administration. More than that, it gets reëlected by overwhelming majorities and has not been in peril at any election. The "Old Crowd" that misgoverned this city for years holds only 20 per cent of the vote now, and concedes without contest the reëlection of three of the five good commissioners. And the total campaign expenses of electing the right men are only $350.

It has been thought that this was the fruit of correct organization, analogous to a business corporation with its board of directors. But there are many other elected commissions and boards in the United States, — County Commissions, Boards of Education, Trustees of the Sanitary District, Boards of Assessors, etc., — and they are not conspicuously successful; but, in fact, such organization often serves only to scatter responsibility and shelter corruption. No! good government is entirely a matter of getting the right men in the first place. Nothing else is so vital. No system, however ingenious, will make bad men give good government or keep good men from getting good results. To get the right men is, first of all, a matter of arranging for the maximum amount of concentrated public scrutiny at the election.

Were it otherwise, we would find misgovernment in British cities, which, except for this feature, are ideally organized from an American grafter's point of view. The British city authorities are hampered most unjustly by a hostile House of Lords, their machinery of government is ancient and complicated, and their big councils, with committees exercising executive management over the departments, with ample opportunity for concealment of wrongdoing, with no restraining civil-service examinations, with one tenth of the laboring population on the municipal payrolls, would apparently provide an impregnable paradise for the American politician of the lowest type. But the ballot for an English municipal election can be covered by the palm of the hand. It contains usually the names of two candidates for one office, member of the council for the ward. (The council elects the mayor, the aldermen, and all other city officers.) Blind voting on so short a ballot is hardly conceivable. Every voter is a complete politician in our sense of the word. The entire intelligence of the community is in harness, pulling, of course, toward good government. An American ward politician in this barren environment, unaided by any vast blind vote, could only win by corrupting a plurality of the whole electorate, a thing that is easily suppressed by law, even if it were not otherwise a manifest impossibility. So there are no ward politicians in England (nor in Canada), no professional politics, and misgovernment is abnormal.

Similarly, Galveston concentrated the attention of the voters sharply upon candidates for only five offices, all very important. The press could give adequate attention to every one, and in consequence every intelligent voter in his easy-chair at home formed opinions on the whole five and had a definite notion of the personality of every candidate. In such a situation the ward politician had no function. There was no ignorant *laissez faire*, no mesh of detail for him to trade upon. He became no more powerful than any other citizen, and his only strength lay in whatever genuine leadership he possessed. Moreover, if he nominated men who could stand the fierce limelight and get elected, they would, *ipso facto*, probably be men who would resist his attempt to control them afterward. Or if they did cater to him, it would be difficult to do his bidding right in the concentrated glare of publicity where the responsibility could be and, what is much more vital, *would* be correctly placed by every voter. And so the profession of politics went out of existence in Galveston and the ward politician who had misgoverned the city for generations went snarling into oblivion.

The Galveston plan would be better yet if the commissioners were elected one at a time for long terms in rotation. Then the public scrutiny at election time would focus still more searchingly on the candidates and merit would increase still further in value as a political asset.

"Politics," seeking reëntrance into Galveston, would make department heads, etc., elective ("make them directly responsible to the people and let the pee-pul rule").

Suppose that they should increase the commission to thirty members elected "at large," with variegated powers and functions. Straightway tickets, cooked up by "leaders," would reappear, and the voter, facing a huge list of names, most of which he had hardly heard of, would impotently "take program" and concede control to a little but active minority, the politicians.

But suppose again that the enlarged commission be elected not "at large," but by wards, one member to a ward. The voter again has only one decision to make instead of thirty. Newspaper publicity is weakened by division, but this weakness is now repaired by neighborhood acquaintance and the candidate's opportunity to make himself personally known to a large portion of his constituency. Once more the voter registers an opinion instead of blindly ratifying the work of a party organization. The ward politician is again left without a function. His popularity may avail in a slum ward and he may thus elect some of the commission, but he will not have, from any citizen who is intelligent enough to do his own thinking, that blind acquiescence which in other conditions had been the bed rock of his power.

Just how we are to get rid of the great undigested part of our long ballot is a small matter so long as we get rid of it somehow. Govern a city by a big board of aldermen if you like, or by a commission as

small as you dare make it. Readjust state constitutions in any way you please. Terms of tenure in office can be lengthened. Many officers, now elected, can be appointed by those we do elect. But manage somehow to get our eggs into a few baskets, — the baskets that we watch.

For remember that we are not governed by public opinion, but by public-opinion-as-expressed-through-the-pencil-point-of-the-average-voter-in-his-election-booth. And that may be a vastly different thing! Public opinion can only work in broad masses, clumsily but with tremendous force. To make a multitude of delicate decisions is beyond its coarse powers. It can't play the tune it has in mind upon our complicated political instrument; but give it a keyboard simple enough for its huge slow hands, and it will thump out the right notes with precision!

There is nothing the matter with Americans. We are by far the most intelligent electorate in the world. We are not indifferent. We do want good government. And we can win back our final freedom on a short-ballot basis!

NOMINATIONS BY DIRECT VOTE OF THE PEOPLE[1]

By Governor La Follette

Every established practice and custom which tends to impair in any degree the citizen's right of suffrage subverts the principles of representative government and undermines the foundations of democracy. Scarcely a score of years has passed since the sacredness of the ballot was made a prominent issue in national campaigns, and, doubtless as a result, there followed much of the legislation which effectively guards the casting and counting of the ballot in the general elections.

It is a plain proposition that the right of suffrage is much broader and more comprehensive than the mere physical act of casting the ballot without interference, and having it returned, as cast, without fraud. All of the guarantees of the constitution, all of the acts of legislation, are designed to secure and record the will of the citizen; to make it certain that, untrammeled and uninterrupted, the influence of his judgment may be felt in matters pertaining to government. If this be the real substance of the right of suffrage, then it becomes an equally sacred obligation on the part of the lawmaking power to so safeguard every step and proceeding which constitutes any element of the right of suffrage that the citizen shall be protected with respect to it.

When the voter enters the election booth to exercise that right, he finds prepared for him an official ballot upon which is printed the candidates of each party for the offices to be filled at that election. This is the first point at which the citizen comes in contact with the perfect system of laws governing general elections. From the moment he enters the booth until the ballot which he casts therein is counted and returned, he can find no cause for complaint.

[1] From a message to the Wisconsin legislature, January, 1903.

But there are important proceedings, vitally essential to the right of suffrage, which are foundational not only to manhood suffrage but to the whole structure of government itself. What transpires back of the moment when the voter receives his official ballot must be as strongly fortified and as sacredly guarded as that which follows in the consummation of this right after he receives the official ballot. In other words, the act of suffrage consists not only in the voting and counting of the ballot, but in every step and every proceeding which is in any way connected with or involved in the preparation of that ballot before it comes to the hand of the voter.

If by bad practices and bad laws all the proceedings which control in the making of the ballot to be voted are taken out of the hands of the voter, his right of suffrage is not only impaired but he has been deprived of it. The voting of a ticket at the general election, in the making of which he has had no voice, robs him of his voice in the election. He has simply been an instrument in the hands of those who prepared the ballot, in casting which he records not his will but their will.

The preparation of the ballot and the placing thereon of the names of the candidates of the respective parties is therefore not a matter of secondary but a matter of primary importance to the exercise of the right of suffrage. It is a matter of supreme importance to the establishment of good government and to the protection of the basic principles of democracy.

The right of suffrage then may be divided into two separate and distinct transactions, each necessary as a complement to the other: first, all of the proceedings, acts, and measures necessary to insure to each citizen the right to vote directly, under the sanction of a law which shall protect him from interference, in the selection of the men as the candidates of his party to be voted for at the general election; second, all of the proceedings so well provided for at the present time by statutes governing the general elections.

The first step in suffrage is exercised in the selection or nomination of the candidates of each party. The second step in suffrage is exercised in the election of the candidate to office. Any interference with the citizen in the exercise of his prerogative in either case is equally destructive to his right of suffrage.

It is no longer open to dispute that the nomination of candidates for office has in a very large measure passed out of the hands of the citizen. For many years it has been popular, with certain theoretical writers upon the subject, to place the responsibility for this entirely upon the citizen himself, and to charge him with dereliction of duty and want of interest in public affairs, absorption in business interests and pursuit of fortune being assigned as primary causes of neglect of these elementary duties of citizenship. But it is fair to say that the citizen always has manifested the same willingness to participate in the affairs of government, to perform

his duties in the elections, to serve in the rank and file of his party in the campaigns, that he has to defend his country in the field when the sterner duties of war summoned him in its defense. A close study of the history of caucuses and conventions will convince any unbiased mind, in search for truth, that the voter has been gradually eliminated as a factor, after long, patient trial, because the delegate system has utterly failed to represent him or to reflect his opinion in its results.

Through the succession of generations human nature is the same, and when De Tocqueville declared that "the most powerful, and perhaps the only, means of interesting men in the welfare of the country is to make them partakers in the government," he uttered a truth which applies quite as forcibly to the primary step in suffrage as to the secondary step in suffrage, — to the nomination of candidates as to their election after nomination. And the interest and influence of the voter can be as well and as certainly secured in the one as in the other, if the same means are taken to guarantee to him the same certainty of result respecting the one as the other.

No man enjoys being made a puppet of, and to rally to the caucus only to have his effort defeated by a well-organized and well-disciplined minority, or, if delegates are chosen who seem to reflect the will of the majority in the caucus, to discover later that, through the complicated system of delegating and redelegating their authority, the nominations finally made are the result of the dickers and deals and combinations and commercial transactions which rule modern conventions. It would be strange, indeed, if the citizen should continue to be interested in the proceedings of a system productive of such results. Abolish the laws which now make elections an honest reflection of the will of the voter and introduce the same elements of uncertainty and fraud which are an inherent part of nominations through convention delegates, and the interest of the citizen in the general election would fail as certainly as it has failed in the preliminary.

It is not enough to say that the voter has his opportunity to attend upon the caucus and express his choice as to delegates. This is to offer the form of the thing for the substance. If the voter, time after time, casts his ballot and elects the delegates of his choice, only to discover in the end that he has been in some way betrayed, and the decision of the majority in fact reversed, it is inevitable that he should as a serious-minded citizen refuse further to participate in the farcial proceedings. It is this that has driven the majority of the voters from the caucus until it is only in times of profound public concern and intense public feeling that even a respectable minority of the voters are represented in the caucus and convention system. The largest attendance upon caucuses in the history of political contests in Wisconsin resulted in polling less than 40 per cent of those entitled to vote, and in many counties as much as 90 per cent of the party vote failed to appear in the returns.

Public interests are certain to fare badly when there exist conditions, either as the result of legislation or for want of it, which eliminate from participation in government a majority of the citizens in a democracy. The evil consequences sure to follow from such a situation are twofold, — in the effect upon the citizen and the effect upon the public official.

If the caucus and convention system operates to exclude a majority of the voters from taking part in making the nomination, it abridges the right of suffrage, it weakens the voter's interest and affection for the state, it instills apprehension and suspicion with respect to that government which the citizen comes more and more to feel is not his government, and deprives the state of that loyalty and devotion which is nourished in unification of interests born out of the largest measure of direct personal participation possible in a representative democracy. This is but another way of saying that the basic principle of democracy is personal responsibility; that there can be no personal responsibility unless the voters are "partakers in the government."

Compelling the citizen to hand his sovereign right, — to vote directly for the candidates of his choice, — over to some caucus delegate, to be turned over to some convention delegate to barter for something for himself, impairs the voter's right of suffrage, and its evil effects in representative government are more strikingly manifest in the actions of the public official than of the private citizen.

The official well understands that his nomination through convention delegates invariably is secured without the consent of a majority of the voters of his party, or, indeed, without the consent of even a fair minority of his party. He well knows the value of the powerful influence of public-service corporations through the caucus and convention, and this knowledge bears strongly upon his official action. He reasons that under ordinary circumstances the unlimited use of money, the support of purchasable newspapers, the maintenance of perfect organization, all attainable through the vast resources of such corporations, will, under ordinary circumstances, enable him to succeed in politics.

No man can have witnessed the protracted struggle in this state to secure legislation equalizing the burdens of taxation, no man can have witnessed the defeat of bills increasing the taxation of the railroads to more nearly their justly proportionate share, and escape the conviction that the present method of selecting candidates for office is radically defective. It cannot be seriously doubted that under a system of nominations by direct vote of the people, their influence upon the official could not fail to be very much more pronounced and direct. He would well understand that in order to secure their approval and support to continue him in public life, he must win that approval upon the merit of his record in their service. He would know that every vote cast, every act as a representative in aid of measures or opposed to measures affecting the public interest, would be canvassed and reviewed when he came to seek

renomination; hence his record as a public official would be made day by day with that sense of personal responsibility, arising from a knowledge of direct and certain accountability to the people, pointing the way he should go.

This is the one thing needful in a republican form of government, and the one thing which cannot be dispensed with in any of the affairs of life where one man performs services for another. No trust would be safe unless the trustee knew that he would be required to render an account of his stewardship to one having authority to terminate it. In no other trust positions are the opportunities for evading responsibility so many or the temptations for betrayal so great and the likelihood of confusing and befogging the issue so favorable as in the public service. Hence it is imperative that the trustee be required to account directly to those whom he represents in the discharge of his trust.

This is the fatal defect in the caucus and convention system of selecting candidates to be elected to office. Even if men chosen as delegates in the caucuses and conventions were never guilty of a willful and corrupt betrayal of trust, if bargains and deals and bribery could be eliminated, nevertheless the entire plan should be abolished because it removes the nomination too far from the voter, the trustee too far from him for whom he bears the trust, the agent too far from the principal. Every transfer of delegated power weakens authority and diminishes responsibility, until the candidate nominated represents nothing that the voter wanted, feels under no obligation to the voter for his nomination, nor is he directly accountable to him for his acts as a public official.

The momentous importance of discarding the delegate system and securing the personal responsibility of the official to the citizen is rapidly coming to be accepted through the country. Already legislation recognizing the principle of nominating by direct vote of the people has been applied in making nominations in a dozen different states, while the legislatures of twenty-two others have taken hold of the subject in an earnest way within the last two years. The demand for direct nominations was recognized in the platforms of both political parties in several states in the recent campaign, and the progressive movement is commanding strong support throughout the country.

To secure a more direct expression of the will of the people in all things pertaining to the people's government is the dominating thought in American politics to-day. The citizen will no longer surrender to delegate, agent, or substitute, any political control which he may properly exercise for himself. He understands that in some matters pertaining to government he must be represented by a public servant. The citizen is resolved to participate directly wherever he can, and in all matters where he must be represented by another, to bring that representative as near to him as possible. The fundamental principle upon which this government was established can no longer be subverted. No more striking manifestation

of this could be found than in the current volume of the *Congressional Record*. For the first time in history the House of Representatives passed, without one dissenting vote, and sent to the Senate a resolution for the election of United States senators by direct vote. The spirit of democracy is abroad in the land. Government is to be brought back to the people.

The nomination of all candidates by direct vote under the Australian ballot should appeal to the patriotism of all legislators and lift them above partisan and personal prejudice, in a united effort to give the people of Wisconsin a system of electing public officials truly representative of public interests; in restoring to the people in full measure this principle of pure democratic government. This is required particularly of Republicans, by every obligation which can be made binding upon the honor of the representatives of any political party in the public service.

Since the adoption of the federal Constitution government in this country has been through the agency of some political party. Political parties are not organized or maintained upon the personality or strength of individuals, but around certain deep-seated ideas which lay hold of the convictions of men. These ideas when formulated and proclaimed become the party's declaration of principles, its promise to perform. This declaration of principles, this promise to perform, is of the highest importance to each citizen. When so proclaimed it enables him to determine his party affiliation. He well understands that one political party or another will control government, will make and administer the laws. Hence he gives his support to that party which promises to do the specific things that he regards of the highest importance to the state and to the welfare of every citizen. The party promise, therefore, is a covenant with the voter upon which he has staked his faith and his interests. He has given his support, he has invested the party with his authority, he has made it possible for the party to control in government. Upon its promise and his support the party has become the custodian of his political rights as a citizen, of his property right as a man.

But the party obligation goes still further. The obligation of the party is made the more binding because it has sought out the citizen, urged acceptance of its pledges, pressed them upon his consideration, proclaimed again and again its purpose to keep them in letter and spirit. It has made the citizen its solicitor and secured his good offices to repeat its promises, proclaim its principles, and enlist in its ranks his neighbors and friends. Having received his vote, his influence, his devotion, the party is bound to keep its pledged word. This is its title to confidence. This measures its value as a power for good in representative government.

The party itself will not fail. Men in masses are not drawn together in support of principles which endure the strain of protracted contest, without fixed convictions. The party is the aggregation of citizens bound

together by an agreement of opinion respecting the declared principles of the party. They are for maintaining the principles and keeping faith with one another. Fixed convictions are the foundations of good faith. The party honor is safe with the party. It will not betray itself.

But the party must select men as its medium of expression in government from the members of its organization and make them public officials to execute the will of the majority. Upon the public official then there falls the full weight of this double obligation. He represents the individual citizen in person. He is the custodian of the party honor. He cannot play fast and loose with clearly understood personal and party obligations and maintain a semblance of official integrity. He has no more moral right to quibble and evade, to say that he will perform a part and repudiate some of the specific promises of the party, than he would have to use in part trust funds committed to his keeping. If this be counted too exact a standard of public duty to-day, be sure that it will not be so regarded to-morrow. The citizen is being rapidly schooled by experience throughout the entire country, and is fast acquiring definite ideas of the right relation of the political party to government, of the citizen to his political party, and the duty of the public official to the citizen, to his party, and to the state.

If government in Wisconsin is representative, then the people of the state have pointed the way for us with reference to the enactment of a law for the nomination of all candidates by direct vote, as well as the enactment of law that shall equalize the burdens of taxation. No question has been more thoroughly presented and more intelligently passed upon in any form of government. For years it had been discussed from the platform and in the press of the state, until it became thoroughly well understood in every community and every household. It was made the subject of emphatic declarations in the platforms of both parties in this state as early as 1898, the Democratic convention declaring in unequivocal terms for the nomination of all candidates by direct vote; the Republican convention declaring for legislation which should give the citizen a more direct expression of his will in the nomination of candidates for office.

Not a vote, however, was cast in the legislature of 1899 for the enactment of a law giving the people the opportunity to select their candidates by direct vote.

The discussion of this subject, so deeply interesting to the voters of Wisconsin, continued, and the convention of the majority party in 1900 unanimously adopted a platform declaring for the nomination of all candidates by direct vote upon the same day under the Australian ballot. Professing a want of confidence in the reliability of the declarations made in a convention, expressing doubt whether such a declaration registered the actual will of the voters represented in the convention, fearful lest the demand as recorded was in fact only a recommendation, and the recommendation in truth the result of misunderstanding, it was deemed

justifiable to refer the entire subject again to the people of the state and once more ask them to proclaim their will.

Since then every phase of the question has been under consideration, every objection has been urged with all the force and insistence which perfect organization and unlimited resource could furnish through newspapers, pamphlets, letters, and personal appeals, and yet the voters of the majority party, speaking their will through the only medium provided, declared by platform resolutions their demand for the nomination of all their candidates by direct vote, and ratified that demand by overwhelming majorities in the late election. Imperfect though the caucus and convention be as a medium for registering the wishes of the voter, we come to the determination of this question with no opportunity to put aside the responsibility placed upon us by the unmistakable commands of those who have commissioned us to represent them in public office. Upon every phase of the question concerning which the people have spoken, if we recognize the principle upon which our government is founded, we have no discretion. With respect to every question not passed upon by the people, we are authorized to exercise our best judgment in representing their interests; but when it has been proclaimed and proclaimed again, so that there can be no possibility of doubt respecting their desire, to ignore it, or to refuse to execute the expressed will of the majority legally recorded, is to violate and trample under foot every principle of government which makes the perpetuity of representative democracy at all possible.

I submit, therefore, that it is not for us to determine what shall be the scope of a law to nominate candidates by direct vote. This has been settled by the people of Wisconsin, to whom the matter has been referred and referred again. They have determined that "all candidates for state, legislative, congressional, and county officers shall be nominated at a primary election upon the same day by direct vote under the Australian ballot."

The voters of Wisconsin are an intelligent, thoughtful body of men. They are entirely capable of passing upon the question and deciding for themselves whether they desire the nomination of all or only a part of their candidates by direct vote without the intervention or interference of any delegates or conventions. They understand that if there is any reason for their taking charge of the nomination of their own candidates for office, that those reasons apply equally well to their taking charge of the nomination of all their candidates for office. They understand that this is particularly true of those candidates which have to do with the making of the laws and with the execution and administration of those laws when made. They realize that under our system the point where government fails is always the point of attack where interests are conflicting.

The overbalancing control which the public-service corporation is exerting in government to-day does not affect in any marked degree the

performance of official duty on the part of county officers. And it will reform no abuse in legislation, insure no better execution of the laws by those charged with their execution and administration, to provide for the nomination of county officers by direct vote; but the influence and power of such corporations is dangerously manifest in the making and execution of the laws, and in the defeat of legislation affecting the interests of the state and the individual citizen as well.

Out of these existing and well-recognized conditions has grown the conviction, gaining in strength year by year with the people of Wisconsin, that the nominations of senators and assemblymen, of state officers and members of Congress, by direct vote will insure a government where the interests of the corporations and the citizens will stand upon a footing of absolute equality.

If in the face of the demand which has come from the people of this state again and again for a law that shall provide for the nomination of all candidates by direct vote, there is to be opposition, it will come from these great corporate interests. Whatever form it may take, in whatever guise it comes, whatever strength it may manifest, behind it will be the public-service corporations of this state. Realizing that the time is past when this legislation can be wholly defeated, their effort may be directed to limit, in so far as may be, the application and scope of the legislation, impair the efficiency of the law as passed, and preserve as much of the present system of making nominations through delegates as possible. Their interests are best subserved through the caucus and convention, and it has become an important function of their political departments to control nominations through caucus and convention delegates, thus securing men who will, when elected, serve them without question. Hence effort may be made to carry some portion of the present bad nominating system past the present session of the legislature, in the hope that so much of it as survives this biennial term may be indefinitely perpetuated in the state.

The suggestion of such a proposition to a legislature, under such specific instructions respecting a measure, serves to illustrate how lightly those who make it regard the obligation of the public official, when nominated by caucus and convention delegates, with respect to the wishes of his constituents, or the promises upon which he was elected to serve them. If such an attempt were to succeed, it could only intensify the feeling and strengthen the purpose of the people of this commonwealth to sweep from the statutes the last vestige of caucus and convention legislation through which men can secure office only to repudiate their political obligations and betray those who trusted them.

If such a course should be urged upon this legislature, it will be for some measure that will leave the executive office of the state where it may be within possible control of selfish private interests through the delegate system of making nominations. The other state officers

doubtless would be joined with the executive in such a proposition, but it would be merely as a makeweight. Whatever the purpose assigned, domination in the executive office would be the real underlying object. Legislation recently enacted in this state, and questions of great public moment already pending, vastly increase the powers and responsibilities of the executive. This office will be the point of vantage in settling many of the important questions of taxation and the regulation of railroad rates during the next few years in Wisconsin. Through the executive office appointments upon the Tax Commission will be made from time to time, as terms expire and vacancies occur. With the creation of a state board of assessment to fix the value of the property of railroads and other public-service corporations, the selection of its members will be made through the executive office, in whole or in part. Through this office will be appointed, in part at least, members of that supremely important commission to regulate transportation rates upon the railroads of Wisconsin, which, I trust, the legislature will provide for before it adjourns.

It becomes at once apparent, therefore, that the office of governor is one in the filling of which special interests, and especially the railroads, will more and more desire to exercise an influence as the years go by. How effectually they can, in any ordinary contest for the gubernatorial nomination, accomplish this, through the manipulation of convention delegates, when they have many million dollars annually at stake, requires no argument to maintain. How utterly impossible for them to dictate nominations when made by direct vote of all the people under the Australian ballot is demonstrated in the utter failure to control elections by the use of money since the adoption of the Australian ballot system of voting.

It thus becomes manifest that the executive should be nominated by direct vote of the people. To limit the application of the primary-election law to the nomination of members of the legislature would be to furnish the people a lopsided and unbalanced system. It would nearly always be possible for the executive, nominated by a system independent of the will of the voters, to stop in the executive office any measure enacted by the representatives of the people. And it may as well be understood now that the question of taxation and the question of the regulation of transportation rates, involving, as it does, the maintenance of commissions appointed by the executive, intrusted with all the power under the law, that to place the office of governor, through a nominating system, where corporate wealth and power may turn the balance, would jeopardize or set at naught the will of the majority on every question and on every issue.

To enact the will of the people into statutory law requires the majority action of Senate and Assembly and the approval of the governor. What, then, will it avail if, in order to insure better government for the people,

they are accorded direct control of the selection of their candidates in the legislature by direct vote for their nomination, and are compelled to leave the nomination of the chief executive of the state to a system in which the influence of the public-service corporation is known to be most potent?

The same principle should be applied in congressional nominations. Members of Congress directly represent the people upon questions of supreme interest to them. The people should have the right to vote directly for or against them in making nominations. Upon trusts, tariff revision, a thorough regulation of interstate commerce by the Interstate Commerce Commission, and many other questions, the public judgment throughout the country is taking very definite form. Under a system of direct nominations, including members of Congress, national legislation in the popular branch of Congress will more nearly reflect the enlightened judgment of the citizenship of this country.

These observations respecting the offices to be embraced in a primary-election law are submitted as sufficient in reason for the complete and thoroughgoing measure which it is assumed by the people of our commonwealth you will enact in good faith. They are submitted more particularly in anticipation of efforts that will be made by the representatives of the public-service corporations again to defeat such legislation, or, failing in that, to except from its provisions such officials as shall in the end cause its purposes wholly to miscarry. Opposition to legislation takes many forms. When defeated upon the main proposition it is almost certain to attempt to destroy the practical application of the principle, or to narrow its limitations, discredit its operation, and insure its repeal as a failure. But the representatives of any interests who would subvert the sovereign and expressed will of the people of this state for the nomination of all candidates by direct vote must wholly fail. However vigorous and sincere has been the opposition of members of the legislature heretofore, it is one of the leading attributes of American character, as well as one of the fundamental principles of American institutions, to accept the will of the majority when fairly and plainly expressed.

Out of the experience of the last two years there has come to all men higher ideals in public life, more clearly defined official obligation, and the promise of a better public service. Nothing of official dignity has been lost. The representative, concerning all matters upon which the citizen has not acted and the party has not definitely instructed him, will exercise his independent judgment in the discharge of his public duty; but he will show an increased regard for the will of the people and for the pledges of his party that shall invest his office with added respect and increased honor. So, too, shall political parties be strengthened in the confidence of the people and protect and fortify the principles of representative government.

The scope of a primary-election law having been determined by the people, it becomes one of the most important duties which will devolve upon the legislature so to formulate the promised measure as to carry out in letter and spirit the expressed will of those who have chosen you to represent them. This I am confident you will perform in the utmost good faith, with a determination to place upon the statutes the best law for the nomination of all candidates by direct vote which it is possible to write.

Whatever may have been the attitude of any member respecting this legislation, whatever misgivings he may have entertained touching the wisdom of the substitution of the direct system of making nominations for the delegate method, he may now feel that he is relieved from all responsibility upon that question. This proposed legislation comes to you from the hands of the people, the sovereign authority of this commonwealth, after repeated adoption, approval, and ratification, with all the sanction in effect which a specific referendum could carry with it.

We are therefore in a fortunate position with respect to all past differences of opinion upon this subject, and can now join in discharging the solemn obligations of a public trust more clearly defined than ever before in the legislative history of this state. We can unite in an effort to give the people of Wisconsin the most perfect statute which can be framed in accordance with the instructions received from them.

MAJORITY NOMINATIONS[1]

By Governor La Follette

As a part of the discussion of the subject of primary elections, in the first message presented to the legislature, January, 1901, I called attention to the objection to nominating candidates by a plurality vote, and suggested that provision could be made to enable the voter at the primary to indicate upon his ballot his first and second choice of the candidates presented for each office. In the event that no candidate had received a majority of first-choice votes, then the second-choice votes could be counted, resulting in a nomination by majority vote.

This suggestion was repeated to your honorable body in the annual message in January of the present year, and your best thought invoked upon the perfection of the primary-election law.

Since that time the statute has been given a trial. In the municipal elections in 1905 it was tested for the first time. The practical trial of the law resulted in its general approval throughout the state. The contention made for it by those who had advocated its adoption was justified. Unbiased judgment everywhere approved the new method of making nominations by direct vote. But the final test of every law is its execution.

[1] From a message to the Wisconsin legislature, 1905.

Whatever of honest criticism came out of the administration of the new statute in the municipal elections was directed against that provision of the law which admits of plurality nominations. It is to this section of the statute that we should apply our best effort for correction. It is here that the enemies of popular government will direct their attack. It is at this point that an attempt will be made to take from the people this fundamental right of self-government which is involved in choosing their own candidates for the public service. This will not be done openly by an effort to repeal the law. It will be attempted indirectly, using it as the pretext to return to the delegate system of making nominations. Fealty to majority control in a democracy is very intense, and it will be urged that majority nominations can only be secured through nominations by delegates in a convention. Asserting that minority nominations are un-American, the attack will be prosecuted under the guise of preserving the majority principle in government.

Whether there is foundation for the assertion that an attempt is to be made to break down the principle of nominations by direct vote of the people will appear when this legislature makes the effort further to perfect the law.

Whatever opposition there was to its enactment, every principle upon which our government rests, demands that the law should now be given a fair trial. This, every man of intelligence knows, carries with it the right to make such change as experiences shall require. The law of 1899, creating the Tax Commission, has required amendment at every session since. The law of 1905, establishing a railway commission, will require amendment at this session, and probably further change will be found necessary at the next session.

The people of Wisconsin, after years of discussion and deliberation, declared in 1900 for the abolition of delegate and convention nominations and for the nomination of all candidates by direct vote at a primary election. The legislation was defeated. Again in 1902 they recorded their decree strongly in favor of nominations by direct vote, and again they were denied by the legislature. Finally, in 1904, for the third time they voted overwhelmingly for the right to make their own nominations by direct vote. I submit, therefore, that the people of Wisconsin are entitled to the best efforts of this and succeeding legislatures, earnestly and honestly directed, so to perfect the law as to preserve inviolate the principle of making all nominations by direct vote, without the intervention of delegates, conventions, or any other agency or political device.

It is but just to remind critics in this connection that no protest has ever been heard against the election of public officials by a plurality vote. Yet at every general election men are chosen by plurality vote to make and administer the laws under which we live. This has never been regarded as offering any reason for an attack upon our general-election

laws, or as an assault upon the principle of democracy upon which our government rests.

Nevertheless, if the principle of majority control can be applied in making nominations by direct vote at a primary election, every man in this commonwealth will agree that it should be done. I believe that majority nominations can be more easily and certainly secured by direct vote of the people than at the hands of any delegate convention, it matters not how the delegates be chosen or how they be limited in their support of candidates.

Let us give to this important question the greatest care, for we may be assured that it is worthy our most serious consideration. The record of Wisconsin is a study for every state in the Union.

It will be urged by those who would break down the principle of nominations by direct vote of the citizen, that, since the primary-election law permits plurality nominations, it should be so changed as to provide for the election of delegates to conventions, and that delegates so elected should make nomination in every case where a candidate fails to get a majority vote under the primary election. This would mean in the end the nomination of practically all candidates by delegates rather than by direct vote of the people. It would easily be in the power of any political organization to put up several candidates for each office and so divide the vote as to deprive any candidate of a majority. Neither would any protection be afforded by limiting the candidates to be voted for in the convention to those who were highest on the ticket at the primary election. There would still be the same opportunity to manipulate delegates and thwart the will of the people by corruption. The moment the important business of choosing candidates is taken out of the hands of the people and turned over to delegates or agents, that moment the mischief is done. The door is open for deals and dickers and fraud. Under this method the people will again lose their control. They can never regain it. Control lost in making the nominations is the loss of control in government.

Precisely this plan for defeating nominations by direct vote and handing the entire business over to delegates was resorted to in at least one state legislature by the political machine last year. A strong popular movement is on in that state at the present time to abolish the election of delegates and the holding of conventions, and to nominate all candidates by direct vote.

The advocates for nominations by delegates claim too much. A little reflection upon the subject will convince any one that in every case where a candidate is strong enough to secure a majority of the votes of the delegates in a convention, he would receive a majority of the votes in a primary election. With the same number of candidates among whom the votes are divided, there would be the same failure to secure a majority on the part of any one of them upon the first ballot in a convention that would occur in a primary election.

A majority nomination in a convention where the vote is so divided among the several candidates that neither has a majority upon the first ballot can be brought about only by delegates subsequently changing their votes and throwing them to some other candidate than the one the voters elected them to support. Such a change on the part of the delegate defeats the will of the voter as expressed in the election of the delegate. The majority nomination accomplished by it is a majority nomination determined by delegates and expresses their choice. It is not a majority nomination made by the voter either directly or indirectly. The man nominated by the delegate may be the very one whom the voter, electing the delegate, would under no circumstances have chosen. In other words, if the delegates are at liberty to vote as they please, then the result is one in the control of which the voters back of the delegates have had no voice. This shifting of the votes of delegates from one candidate to another, through which a majority nomination is finally secured, occurs under all the circumstances and conditions which have discredited the work in nominating conventions in every state.

If majority nominations can be secured by direct vote of the people in a primary, it must be conceded that it would be preferable to transferring this important business to delegates. That this can be easily attained is very apparent upon examination. We have but to turn to the country from which we took the Australian ballot, for our lesson. Since 1892 the elector there has enjoyed the right to use what is called the "contingent vote." This is simply the "order of preference" called into play to assert the principle of election by absolute majority. This plan provides a ballot upon which the elector marks his first and second choice or "order of preference."

Where but two candidates are in the field there is no occasion for the exercise of the second choice in order to insure a majority nomination, but where there are three candidates or more than three candidates, the ballot provides opportunity for the delegate to indicate his second choice. If, after the ballots are counted, no candidate has an absolute majority of first-choice votes, then the ballots cast for the candidate receiving the least number of votes on the list are assorted with reference to second choices for the remaining candidates.

If no one then receives a majority of first and second-choice ballots, a similar assortment of the ballots of the lowest remaining candidates is made on the basis of second choices and added to the votes of other candidates, and so on until some candidate has a majority of first and second choice. An examination of this subject will make it plain that under this method it will rarely be necessary to canvass the entire second-choice vote to secure a majority nomination. This plan effectually prevents the lowest or weakest candidate from getting a nomination on second choice. It accords to the first-choice vote its due importance over that of the second choice, and secures to the candidate strongest with

most of the voters the majority nomination. This is a simple method of determining by majority vote the nomination of a candidate for each office on the primary-election ballot.

A moment's reflection will make it manifest that this is the application of precisely the same principle which is resorted to in making a majority nomination in a convention which takes place after it is discovered that there is no nomination made upon the first formal ballot. That is to say, the delegates in the convention, after the first ballot, must, enough of them, abandon the support of the candidate of their first choice to make a sufficient number of second-choice votes, with those of the first choice, which the favored candidate had from the beginning, to give to such candidate a clear majority. In other words, giving the voter a chance to express not only his first but his second choice of candidates upon the primary-election ballot applies identically the same principle to securing a majority nomination in a primary election that must be resorted to in a delegate convention with a like number of candidates to secure a majority nomination.

An examination and test, such as any one can readily make for the purpose of illustration, shows the reliability of the method here outlined. The voter simply indicates on his ballot not only the name of the candidate of his first choice, but the name of any other candidate for the same office, for whom he desires his vote to be counted, in the event that the candidate of his first choice does not receive an absolute majority of votes. This indication may be made by writing the figure 1 in a blank space on the ballot, after the name of the candidate of his first choice, and the figure 2 after the name of the candidate of his second choice; and the same principle may be applied, allowing the exercise of further choice, depending upon the number of candidates for each office.

In this way the law is made to offer to the elector the largest possible opportunity for the exercise of his influence as a citizen in the selection of the men who are to become his representatives in government. There could be no failure to nominate by an absolute majority vote, and that vote would always represent the will of the majority of the electors. The voter would have no complaint to offer respecting any nomination. The act is his own. He has not been compelled to hand his rights as a voter over to some delegate to be disposed of in a convention where he may easily be betrayed, and if disappointed, where he is certain to believe that he has been betrayed.

This plan would go far to strengthen confidence in party nominations and restore faith in public officials. It insures to the voter the full measure of his right of suffrage. It removes the last objection which can be raised against nominations by direct vote. It is right in principle and has proven successful in practical application. I commend it to your favorable consideration.

AN ESSENTIAL AMENDMENT TO THE PRIMARY LAW[1]

By Charles K. Lush

This is written in the hope of making plain the basic principle upon which the second-choice amendment to the primary rests. It is the principle that the nominee of a political party should represent the party principles or policy of the majority of the voters of the party. It prevents the possibility of a man representing the principles of only one quarter of the voting strength of the party being nominated as the candidate of the party, and in direct conflict with the views of three quarters of the voters of the party. It was the recognition of this principle that caused conventions to nominate by *majority* vote of the delegates instead of by plurality. The writer makes only one contention, and that is that the present primary law is a manifest absurdity as a nominating machine. It prevents a number of candidates representing the majority sentiment as to party principles from coming into the field as candidates for the nomination, for fear the candidate of the minority might be named by receiving a higher vote than any one candidate among the majority candidates. The present primary is, in effect, a convention to which every voter is a delegate and in which the candidate receiving the most votes on the first ballot is the nominee. The remedy lies either in the adoption of the second-choice amendment (derisively known as the Mary Ann Law), or by return to the convention system.

An effort has been made, concerted and vigorous, to make it appear that the second-choice system is very complicated. The voter casts one vote for a candidate as his first choice, and another for the man whom he would like to see nominated if his first choice cannot be nominated. So far as the voter is concerned, there is no "complication." Delegates who attended state conventions did not find it complicated to vote for their second choice after they found that their first choice could not be nominated. *The primary is, in effect, a state convention to which every voter is a delegate.*

But there are two "complications." There is much complication in the mind of the average statesman and politician when he sits down and tries to figure out how he could manipulate the second-choice vote. Being "complicated" on this important point, it is to his interest to keep everybody else "complicated."

The second "complication" exists in the minds of the people, through the efforts of a few instructors, the newspapers, etc., to explain how the second-choice vote is counted. There are some things that are exceedingly difficult to make clear without the aid of illustration; for instance, problems in simple mathematics. But with the aid of the very simple

[1] From a pamphlet on The Second-Choice Arrangement.

diagram of the tally sheet and the checking and computing blank, this is all made clear in an instant. It is one of the things you can't explain. You have got to show it, and, to begin, the ballot is given herewith, the crosses indicating the choice of the voters in this instance.

For Governor	First Choice	Second Choice
Adams		
Brown	X	
Black		
White		
Gray		X

Following is the official tally sheet upon which the first and second-choice votes are entered, being called off in this case: "For governor, Brown first, Gray second." Supposing the ballots of one precinct have been called off, the sheet shows as follows:

For Governor — *Official Tally Sheet*

First Choice \ Second Choice	Adams	Brown	Black	White	Gray
Adams 25			15	10	
Brown 43	15		25		3
Black 20		15		5	
White 55	7	10	30		8
Gray 17		15		2	

Carried down, the first-choice vote, or first ballot of the "convention," is as follows:

Adams	25
Brown	43
Black	20
White	55
Gray	17

There being no majority on the count of first-choice votes cast, and Gray being the lowest man, he is beaten and out of the race, so those who voted for Gray are entitled to have their votes counted for their second choice, making the result as follows:

Adams	25		
Brown	43	15	58
Black	20		
White	55	2	57

Black is now the low man, and the men who voted for him as their first choice are entitled to have their second-choice votes counted for their second choice. Repeated as above brings the following result:

Adams	25		
Brown	58	15	73
White	57	5	62

There are only Brown, White, and Adams left, and Adams being defeated and low man, his adherents are entitled to express a second choice, and their votes are counted, making the final result as follows:

Brown	73	0	73
White	62	10	73

It will be seen by studying the above table that Brown made no gain on the final "ballot," for the reason that none of the 25 voters who voted for Adams for first choice voted for Brown for second choice. Ten of them, however, voted for White as their second choice, while 15 of them voted for Black as their second choice. These 15 second-choice votes are not counted for the reason that they were being counted for Adams while he was still in the race, and before Adams was out of the race Black was out of it. These voters simply voted for two losers, as might have been the case had McGillivray and Connor remained in the race for governor, and had they voted for Connor for first choice and McGillivray for second choice. This explains why, in the above showing between Brown and White, their total vote is only 145, while there were 160 votes cast in all. But 15 of these votes were cast for Adams and Black, both of whom were low men, — two losers.

This system does not always insure a majority of all votes cast, but it does insure the nomination of a candidate who represents the majority

sentiment of the party as regards party principles. Let us illustrate by showing what can happen under the present law, where a first choice alone counts and the high man is nominated, all of the rest being "eliminated." To begin with, remember that the present primary is, in effect, a party convention to which all party voters are delegates, entitled to one vote on the only "roll call" allowed. The man who receives the highest vote on this "first ballot" (the primary vote) is the nominee of the party.

Let us suppose there were 3 tariff-reform Republican candidates and 1 stand-pat candidate in a congressional district and 3000 stand-pat Republicans. At the primary the result could reasonably be supposed to be as follows:

A, stand-pat candidate	3000
B, tariff-reform candidate	2500
C, tariff-reform candidate	2500
D, tariff-reform candidate	2000

By this result, with the present system of the highest candidate being the nominee, the stand-pat Republican would become the nominee of the 7000 voters absolutely opposed to the policy advocated by him. Could anything be more absurd than this?

Now let us use this same case and apply the second-choice rule by which the lowest candidate is "eliminated," and not all but the highest "eliminated," which is the present primary law.

The first count of first-choice votes would be as above given and now put down again:

A, stand-pat candidate	3000
B, tariff-reform candidate	2500
C, tariff-reform candidate	2500
D, tariff-reform candidate	2000

Each voter having expressed a second choice, and D, one of the tariff-reform candidates, being the low man, he would be out of the race, so the voters who voted for him for first choice would be entitled to have their second-choice votes counted. Now would they not be sure to be divided between the two other tariff-reform candidates, — men who represented their views on party policy? Suppose they had divided, 1500 of these having been cast for B as their second choice, and 500 for C. The final result would be:

A, stand-pat Republican	3000
B, tariff-reform Republican	4000
C, tariff-reform Republican	3000

B would accordingly be the candidate representing the views of 7000 voters, instead of A, representing the tariff policy of only 3000 voters.

The present primary law is an absurdity because it applies the plurality rule to what is, to all intents and purposes, a political convention. It is exactly the same as though the old convention had assembled and made

the man who received the most votes on the first ballot the nominee, even though he represented the views of not more than one quarter of the delegates, they representing by the same proportion the views of the voters who sent them to the convention.

Either the second-choice amendment to the primary law should be adopted or delegates should be chosen to a convention where the delegates, under convention rules, would always nominate a candidate representing the majority sentiment as to party policy.

The failure of the legislators to adopt the second-choice amendment at the last session illustrates how difficult it is to secure remedial legislation in a case of this kind. No sooner is a voter selected from the army of voters and made an officeholder than he ceases to see problems from the viewpoint of the voters, but looks at them from his own position as an officeholder and prospective manipulator of candidacies. The absence of any effective champion of the second-choice amendment — and the second choice is not really an "amendment," but an essential part of the primary law left off either through ignorance or reprehensible cunning — is by no means a triumph for the first test of representative government in Wisconsin.

The present primary law fosters the power of a party boss. This "boss," be his leadership for good or for evil, has the power to place candidates early in the field, and then warn other men not to become candidates on the unassailable ground that a number of candidates of the majority faction might split the vote and allow the solitary candidate of the minority to be chosen as the party nominee. By thus naming the candidate of the majority faction of the dominant party the boss is all-potential. Had the second-choice feature been left a part of the law, the leader of the majority faction would have had no such power, for several men of known loyalty to the principles of the majority faction could be candidates, secure in the knowledge that those who voted for them as a first choice would give their second choice to some candidate representing the same principles and advocating the same line of legislation, thus precluding the nomination of the minority candidate. The boss, or leader, might still properly give his support to some one of the candidates, but it would be plainly a matter of personal preference, and not justified on the ground of safeguarding the rights of the majority to name the candidate of the party.

Under the present nominating law it is really necessary that the "boss," or leader, should "eliminate" the candidates of the majority *before the primaries are held*, otherwise the candidate of the minority might be made the nominee of the party. Under the second-choice feature, which was a part of the Australian law and left off by the drafters of the Wisconsin law, the voters do this "eliminating" at the primaries. Until this opportunity of selection is placed in the hands of the people there can be no true representative government in Wisconsin.

The second choice, which is an integral part of a primary system, would restore the rights made inoperative by caucus and convention manipulation. When that is done, representative government will be something more than a figure of speech in an outburst of oratory.

POPULAR CONTROL OF SENATORIAL ELECTIONS[1]

By G. H. Haynes

The Constitution requires that the senators from the several states be elected "by the legislatures thereof." Gradually, however, the feeling has become widespread that many of the men who, in recent years, have found their way to the Senate are little disposed to hold themselves responsible to the people or to heed the broader interests of the country. Rightly or wrongly, this imperfect sense of responsibility shown by the senators is being attributed in increasing measure to the process and organ of their election; and the same distrust of state legislatures which has led to the stripping away of many of their powers, through amendments to state constitutions and other forms of direct legislation, now gives rise to the demand that the choice of senators shall no longer be left to the caprice of these legislatures, but that it shall either be taken away from them entirely, or at any rate be subjected to effective popular control. The first of these demands is the basis of the propaganda, first put forward eighty years ago, and in the last decade rapidly growing in volume and insistence, that the Constitution be so amended as to provide for the election of senators by the direct vote of the people. In many ways this seems both the most direct and the most natural method of securing senatorial responsibility. Yet the obstacles in the way of its attainment have hitherto proved insuperable. They are raised not only by those who have no faith that popular election would prove an effective remedy, but also by those who regard such a change of the Constitution as either impossible or inexpedient. Nevertheless, during the past decade the agitation in favor of this amendment has acquired such force and definiteness that to many its adoption seems close at hand.

But meantime much the same goal has been sought by a very different route. In true English fashion, custom and precedent have here been at work changing the spirit and import of the law while its letter remains ever the same. Sometimes by mere tacit understanding, sometimes by the insistence of political parties, sometimes by the direct and positive interposition of state law, this movement has gone forward with ever-increasing force, until a point has been reached where it is well to take a survey of what has already been done and attempt a forecast of what may yet be accomplished in the way of securing popular control

[1] From *Political Science Quarterly*, 1905. Reproduced by permission.

over senatorial elections without recourse to amendment of the federal Constitution.

Notwithstanding our rigid Constitution's decree that the senators from the several states shall be elected by "the legislatures thereof," this act of the legislatures may be deprived of nearly all of its vitality. The election of president offers an illustration of the filching of actual power away from the electors in whom it is vested by law. When James Russell Lowell, a Republican elector for Massachusetts in 1876, was urged to exercise his independence and vote for Tilden, he declined, saying that "whatever the first intent of the Constitution was, usage had made the presidential electors strictly the instruments of the party which chose them." The Constitution remains unchanged, yet presidential electors recognize that they have been stripped of all discretion. It appears that under certain conditions the election of senators by state legislatures has been and can be made an equally perfunctory affair.

The simplest way in which popular suggestion or pressure may be brought to bear upon the legislature is through the indorsement or nomination of some candidate for senator by the state convention of the party. Thus, in April, 1858, the Democratic convention of the state of Illinois gave its indorsement to the position which Douglas had taken on the Kansas question. Every one recognized this as equivalent to naming him as the party's candidate for reëlection to the Senate by the legislature which was to meet a few months later. The Republicans promptly put forward Lincoln as his opponent, and at their convention in June passed the following resolution: "Honorable Abraham Lincoln is our first and only choice for United States senator to fill the vacancy about to be created by the expiration of Mr. Douglas's term of office." In point of law the great debate which followed was but an incident in the election of a legislature with which alone rested the power of electing a senator, but the whole country knew who was to be senator as soon as the votes for the members of the legislature had been counted. The issue between these two candidates had been so dominant, the people's will so directly expressed, that doubt or hesitation was out of the question. Four years later Charles Sumner had lost favor with certain elements of the Republican party in Massachusetts, on the eve of the expiration of his second term. His adherents, therefore, were determined that the party should be pledged to his support, and in the state convention they secured the adoption, not without opposition but with much enthusiasm, of a complimentary resolution nominating him for reëlection. In the legislature his election followed without opposition and as a matter of course.

Yet this method does not always yield assured and satisfactory results. In both cases already cited only two great parties were pitted against each other, and the issue between them was clearly drawn. But in the more tangled political conflicts of recent years, where parties are split

into factions and where issues are purposely blurred, the skirmish in the convention by no means decides the campaign. When the legislature meets, the chances are that no one of the convention-indorsed candidates will secure a clear majority on the first ballot, and in the attempts to form coalitions, the restraints of the convention's instructions soon get relaxed. Even if the man of the convention's choice is finally elected, it is only after a bitter contest, in which charges of bad faith and corruption are freely exchanged. Precisely such an experience, for example, was had in the Minnesota election of 1893, in the hard-fought election of the late Senator Cushman K. Davis, and public dissatisfaction found expression in such editorial comment as this:

> When the legislators refuse to vote for a candidate who has been indorsed by the people, by the party convention, and the united party action, and for such refusal are able to offer not a syllable of objection to the candidate's moral and intellectual fitness, it is time such men were not given power to defeat the people's will.[1]

Except in states where one united party has an overwhelming majority, and until the choice of senator comes to be the dominant issue in the election of members of the legislature, they will therefore continue, whether for good or ill, to exercise not a little independence of convention restraints, to the occasional confounding of the people's best hopes and most confident expectations. Moreover, it must not fail to be observed that, while the designation or indorsement of a senatorial candidate may, under certain conditions, amount to his virtual election, it involves not one whit of genuine popular control of senatorial elections, unless the party machinery in that state is so contrived and so operated as to insure a trustworthy expression of the people's choice. Otherwise it amounts merely to the choice of senator by a servile convention at the dictation of the ring or of the boss, and the last state of that election is worse than the first.

In recent years no other department of political legislation of the several states has been subject to such restless change as that relating to the nomination of candidates for public office. Repeated and painful experience of the abuses of party machinery, and in particular of the delegate-nominating convention, has led to a determined movement for the securing of the direct primary. Throughout the country the dominant tendency has become to accord to the people, in form at least, the right and the opportunity to share in the choice of men for the public service. Although the senatorship lies outside the state system, direct recourse to the people in the primaries for the selection of senatorial candidates finds a precedent as early as 1890. Again, as in the indorsement of senatorial candidates by party conventions, it was Illinois that set the example. Says Senator Palmer:

[1] Minneapolis *Tribune*, January 21, 1893.

Election of senators by a popular vote, which by common consent should control the members of the legislature, was not novel to the people of Illinois, for they were familiar with the great contest of 1858.

In 1890 the state committee of the Democratic party, in connection with the call of the state convention, put two propositions before the voters: (1) the propriety of a nomination by the proposed state convention of a candidate for senator, to be voted for by the people at the next election, as directly as possible under the provisions of the Constitution; and (2) the selection of a candidate for senator, if it should be determined that a candidate be nominated.

Result: Primary conventions held in more than 90 out of the 102 counties of the state, including the county of Cook, which now contains nearly if not fully one fourth of its population, determined to nominate a candidate, and indicated their preference for the person to be presented to the people. The state convention expressly approved the plan of direct election and indorsed the candidate. He accepted the platform and toured the state. On the issues 101 (out of 202) members were elected to the legislature by an aggregate plurality of 30,000 and over. These 101 members of the legislature, regarding themselves as electors chosen to register the will of the people, between the 21st day of January, 1901, and the 11th of March, voted for the candidate nominated in 153 ballots, and on the 154th ballot they were joined by two members of the House of Representatives who were favorable to the election of senators by the direct vote of the people of the several states, and on that ballot a senator was elected.[1]

It was by virtue of the will of the people, thus directly expressed in his own nomination and election, that Senator Palmer felt himself called of the people to stand forth as their champion in the Senate in the fight for the amendment of the Constitution. Yet this very experience shows how far from effective, in such a state as Illinois, is the popular control which can be exercised over senatorial elections by direct nominations indorsed by party conventions and followed by the election of legislators upon this as the main issue; for, although Palmer's candidacy was backed by a "plurality of over 30,000," the legislature was in deadlock for nearly seven weeks before his election was effected, and even then it was brought about only by the votes of two men who, as his opponents asserted, had been pledged to vote against him.[2]

It is in the states where a single party has so established its dominance as virtually to take over to itself the functions of the state that the direct primary has found most ready adoption. So congenial has this new institution proved throughout the South that it "is now no unusual thing for the number of votes cast in a general election to fall to a very small proportion, sometimes as low as from 10 to 25 per cent of the vote cast in the nominating primary for the same candidates."[3] As the people of the southern states have accustomed themselves to "take part in the choice

[1] *Congressional Record*, Vol. XXIII, p. 1267.

[2] Compare Senator Chandler's account of this election, *Congressional Record*, April 12, 1892, Vol. XXIII, p. 3197.

[3] Francis G. Caffey, *Political Science Quarterly*, March, 1905, Vol. XX, p. 61.

of their [state] officials almost entirely by the indirect method of sharing in the selection of the candidates of one party, it has been almost inevitable that the same procedure should be extended to the choice of senators; and, without any explicit provision of law, in most of the states senatorial contests have come to be finally decided in the primaries. How closely this method may approximate to a popular election of senators is clearly shown by Governor Jeff. Davis, of Arkansas:

> The last state convention adopted a resolution that the candidate for the United States Senate receiving the highest number of votes in the primaries should be declared the choice of the Democratic party for the United States Senate by the state convention, just as they declare the nominees of the party for state offices; and of course the legislature has no duty depending upon them but to cast their vote for the person declared the successful candidate by the state convention. This is absolutely equivalent to election by the people. You see this can happen in this state because the nominees of the Democratic party are considered as elected, as our legislature consists of 135 members and only two are Republicans.[1]

To show the extent to which, in many states, the legislature's function in the election of senators has become atrophied, it is only necessary to note the growing frequency of unanimous elections. In 1900 Senator Morgan received a unanimous election from the Alabama legislature, and in Louisiana two senators were thus elected. In 1901 Senator Tillman was thus returned to the Senate from South Carolina; in 1903 the vote was unanimous for Pettus in Alabama and for Latimer in South Carolina. In 1904 Foster, in Louisiana, and both Money and McLaurin in Mississippi were unanimously elected. Upon the surface these election returns might seem to indicate such preëminent qualifications in the senators chosen as totally to eclipse all other candidates. As a matter of fact, however, many of these unanimous elections have been preceded by the most acrimonious of campaigns. The unanimity of the election in the legislature merely signifies that, inasmuch as all the questions had been settled in the primary, "the election itself is a mere legal formality, to which no more attention is given than is necessary to record the result of the primary." Throughout the South this method of nomination has been introduced as a mere matter of party rules, binding upon the dominant party and hence having the effect of genuine laws. In Mississippi, on the other hand, the act of 1903 invokes the strong arm of the law to regulate the primary and to make it as much a function of the state as is the election itself. This law abolishes all nominating conventions of whatever grade and makes specific provision for the nomination of all elective officers, including United States senators, by direct primaries.

In other sections of the country, too, the direct primary is making rapid progress. The recent laws in Minnesota, Michigan, Indiana, and Massachusetts provide machinery which may readily be adapted to the

[1] Letter of Governor Davis to the writer, August 29, 1904.

nomination of senators; while the new laws of Wisconsin and Illinois proceed directly to that goal.

In western states the tendency in recent years is not to rest content with the designation of senatorial candidates by the state convention, nor even with the nomination of candidates by the primaries, but rather to insist upon going through all the forms of a popular election, the whole process being under the supervision not of party leaders but of state officials. Thus as early as 1875 the following proposition was submitted by itself to the voters of Nebraska, and was by them adopted as a part of the new constitution of that year:

> The legislature may provide that, at a general election immediately preceding the expiration of the term of a United States senator from this state, the electors may by ballot express their preference for some person for the office of United States senator. The votes cast for such candidates shall be canvassed and returned in the same manner as for state officers.

This thoroughly democratic provision for a preliminary popular election was for a long time absolutely unique; yet the people of Nebraska have seemed to take little interest in it. In twenty-five years and more since it became a part of the constitution they have made use of it but once, and then with results that are significant. In 1886 General Van Wyck made an active canvass of the state in his own behalf as an anti-monopolist. Neither the Republican nor the Democratic party put forward a senatorial candidate in the popular election in November, at which, although 138,209 votes were cast for governor, only 50,448 voters expressed a preference for senator; of these more than 91 per cent voted for Van Wyck. When the legislature met, he led on the first two ballots, receiving 40 votes out of 100; but he failed to secure the election, a result which he attributed to the interference of railroad officials and monopolists. As to the present attitude of the people toward this election, the governor of Nebraska writes:

> In 1898 this matter was included in the proclamation, but there was a very feeble response. From most counties no returns were made. In the fifth and sixth congressional districts combined (which would normally contain not less than 75,000 voters) only 626 votes were cast on this preference. It appears to be generally popular throughout the state, but there is a general apathy when it comes to placing the matter on the ballot.[1]

In other states more recent laws have been framed upon this subject with greater and greater particularity. Their titles and preambles leave no doubt as to their motive. Thus in 1899 Nevada enacted a law entitled "An act to secure the election of United States senators in accordance with the will of the people and the choice of the electors of the state, and to obtain an expression of such choice and to prevent fraud and official dereliction of duty in connection with such elections."

[1] Letter of Governor John H. Mickey to the writer, August 31, 1904.

This law provides that candidates for the Senate may be nominated in the same manner as the candidates for the state offices; the names of the senatorial candidates having been given a place upon the ballot, the votes upon them are certified in the same manner as upon the other candidates, and the Secretary of State is required to transmit the results to the legislature when it meets for the formal election. Accordingly, in Nevada, a party convention nominates on the same day — as was done August 10, 1904 — candidates for the United States Senate, for representative in Congress, and for judge of the state supreme court. The subsequent election process in the case of all these candidates is precisely the same, except that the election of the judge and of the member of Congress is complete when the returns of the popular vote are duly certified, while in the case of the senator, the only election of which federal law takes any account does not begin until months later, when the legislature takes up that task. As regards the election of a senator, accordingly, all these elaborate operations are but a complicated method of bringing moral pressure to bear upon men who, in spite of it all, have a perfect legal right to vote for the man of their party allegiance or of their personal liking.

By the Oregon law of 1901, as in Nevada, the whole process is assimilated to that employed in the election of state officers; in one respect, however, the people's choice for senator is more forcibly obtruded upon the legislature. Duplicate copies of the returns are to be sent to the House and to the Senate, and their respective presiding officers are required to

> lay the same before the separate Houses when assembled to elect a senator in Congress, as now required by the laws of Congress, and it shall be the duty of each House to count the votes and announce the candidate for senator having the highest number; and thereupon the Houses shall proceed to the election of a senator, as required by the act of Congress and the constitution of this state.

The plain intent of this law was to subject senatorial elections to a popular control more direct and more imperative than had ever before been attempted by any state. It would hardly be possible to say to the legislature more plainly, "This is the way; walk ye in it." What has been the result? At the assembling of the next legislature Governor Geer put before them the situation as follows:

> In obedience to a general demand from the people and the press of the state, the last legislature passed a law providing for a direct vote on candidates for United States senator. After a careful revision during its passage this law was enacted by a vote that was practically unanimous, and in exact accord with its provisions the popular vote was held last June. . . . In many states of the Union the result of this first attempt at the popular vote for United States senators is watched with much interest, and its prompt observance and ratification will not only encourage its adoption in other states, but will prove the

sincerity of our protestations in favor of popular election of senators and render impossible a repetition of former experiences in Oregon, to prevent which this law was formulated, supported, and adopted.

This experiment certainly deserved the serious attention of the other states, but the note of strenuousness in the governor's words in reference to it may possibly be related to the fact that he himself was the candidate who had carried the popular election by a large majority. On the very day when the legislature had been thus exhorted, January 20, 1902, there were transmitted to the separate Houses of the legislature, with all due formality, copies of an abstract of votes cast at the general election for senator held during the previous June. In the House the Speaker appointed a committee of three to assist in canvassing the vote, and the result was announced as follows: For T. T. Geer, 44,697, for C. E. S. Wood, 32,627. The record proceeds: "The election of United States senator being next in order, Mr. Denny placed in nomination Honorable T. T. Geer, Mr. Phelps placed in nomination Honorable C. W. Fulton, Mr. Galloway placed in nomination Honorable C. E. S. Wood. The roll was called with the following result: Geer, 12; Fulton, 19; Wood, 12"; and scattering votes for eleven other candidates. Thus the man who had secured a majority of 37 per cent in the popular vote received only a small minority on this first ballot in the House. The election was thrown into the joint assembly, and there the deadlock, which seems to have become the normal thing in the legislatures of Oregon, forthwith began. Not until it had lasted more than five weeks did it become possible, at a night session, on the forty-second joint ballot, to elect a senator. The candidate elected was a man for whom not a single vote had been cast in this much-vaunted popular election, which had been instituted for the express purpose of affording the people "an opportunity to instruct their senators and representatives in the legislative assembly as to the election of a senator in Congress from Oregon."

But schemes for controlling the legislature's choice have gone even further. In Colorado there was recently introduced a bill of a much more radical nature. It provided that at the general election next preceding the time for electing a United States senator, each political party might place upon the ballot the names of five or less candidates for the Senate, and bound the members of the legislature under penalty of expulsion to vote for the candidates of their respective parties receiving the greatest number of popular votes. This bill did not become a law. Had it done so, its constitutionality might possibly have been successfully contested. But its introduction is highly significant of the growing determination on the part of the people of the western states that in electing senators their state legislators shall presume to exercise no independence of choice, but shall merely register the people's expressed will. The fundamental idea in this novel Colorado proposal, it is interesting to note, has received the approval of distinguished authority: in the debate over

the law of 1866 both Senator Williams and Senator Sumner insisted that, although the Constitution directed that senators should be chosen by the legislatures, their constituents had a right to instruct the members as to their votes for senator, and had a right to be obeyed.

It may prove possible for the states to give the people free power of nomination and yet leave to the legislatures a power of election which has not been reduced to a mere form. Along this line the suggestion has recently been made that the names of all candidates who receive a certain number of votes (say 3000 or 5000) in the direct primaries be printed upon the official ballot at the general state election; and that the result of this election, as represented by the list of those candidates (say five or ten) who have received the highest number of votes, be a popular instruction to the legislature to choose from them a senator by the Australian ballot, each member to vote on the first ballot for three on the list, and on the second for one (or two, as the case may be) out of the three highest, as determined by the first ballot. Among the benefits to be expected from such an elective process it is predicted that choice would no longer be a choice of two evils, and that worthy candidates would "tend to multiply, since they could allow their names to be used without loss of self-respect."[1] This scheme has been criticized as "academic," yet it has much to commend it for practical experiment. The constitutionality of limiting the legislature's range of choice to the list of candidates sent up by the people may be questioned; but even if such a limitation were not rigidly enforced, the list of nominees with such backing could not fail to have a large measure of influence.

The object of this study has not been to set forth isolated experiments in constitutional law and custom, but to trace the progress of a movement which, during the past thirty years, has taken on different forms, has employed different means and methods, but has ever kept the same spirit and aim, — a determination that the Senate of the United States shall be made responsible to the people.

The route first attempted was by way of an amendment to the Constitution, providing for the election of senators by the direct vote of the people. Only under urgent prompting from outside did Congress accord serious attention to this project; for years it received little more than perfunctory lip service; yet so insistent became the demand that five times, and by ever-increasing majorities, the House of Representatives has passed a resolution proposing such an amendment. But progress toward the goal by this route has always been blocked upon reaching the frozen sea of the Senate's stolid resistance. In despair of success upon this line, recourse has been had to the optional but hitherto untried method of proposing amendments; state legislatures have been calling upon Congress to summon a convention for the express purpose of initiating

[1] See P. Garrison, "The Reform of the Senate," *Atlantic Monthly*, August, 1891, Vol. LXVIII, pp. 227–234.

this amendment. In one form or another the legislatures of thirty-one states — more than the full two thirds prescribed by the Constitution — have communicated to Congress their formal approval of the proposed change in the Constitution; indeed, if the votes in the House be taken as a fair representation of the will of the people in their constituencies, only two states in the Union have failed to give their indorsement. Along this line, then, the movement has reached a point where it needs but the putting of these requests into a common form, and the marshaling of this scattering fire of resolutions into one concerted volley of demand, to constitute a mandate which the Constitution gives Congress no warrant but to heed. That the House would offer no obstruction every precedent makes clear. Would the Senate still demur and thus invite disaster upon itself?

Meantime a vast deal of ingenuity has been devoted to attempts to reach popular control of senatorial elections by some other route than the amending of the Constitution. While the form of election by the legislature is retained, its spirit has been radically changed. In no state in the Union to-day do members of the legislature proceed to the election of a senator with that enlightened independence, that freedom of individual discretion in the choice, from which the Fathers anticipated such beneficent results. Everywhere the legislators approach the task under the domination of party, and in every state where one well-disciplined party is in power the result of the election is a certainty even before the legislature convenes. Not only has party spirit claimed this election for its own, but the party's choice for senator is often made before the members of the legislature are elected, and is obtruded upon that body by the state convention. Already in about a third of the states, either under party rules or in accordance with the explicit provisions of state law, direct primaries name the candidates, and wherever a strong party is supreme this nomination is tantamount to an election. In four states provision is made for a popular "election" carried out under the supervision of officials not of the party but of the state, — an election as complete in all its details and formalities as is that of the governor, yet as void of legal power to bind the legislature in the real election of a senator as would be the resolutions adopted by a boys' debating society.

Everywhere the movement for the direct primary is gaining ground. How will this advance affect the movement for an amendment authorizing popular election of senators? Both are outgrowths of the same democratic spirit. Some enthusiasts for the direct primary claim that the adoption and intelligent use of that device will restore to the legislatures their pristine purity and independence and fit them to perform the task of selection which the Fathers devolved upon them. But this optimistic forecast neglects two of the plainest lessons of experience. In the first place, the betterment of the legislatures through the nomination of their members by direct primaries does nothing to remove the perverting and

corrupting influences exerted upon the legislatures by the retention of this incongruous electoral function. Of all the causes which have tended to degrade our lawmaking bodies hardly any other has exerted so malign a potency. To these bad influences the direct primary aims merely to subject a higher grade of legislators, possessed, it is assumed, of greater powers of resistance. In the second place, the Oregon fiasco of 1903 was hardly needed to afford convincing proof that the indorsement of senatorial candidates by state conventions, their nomination by direct primaries, even their "election" by an overwhelming majority of the vote of the people, may count absolutely for naught in influencing the real election at the hands of a legislature ruled by party bosses or rent by factions which this very election has brought into being. In the very states where popular control of senatorial elections is most needed, the best-laid schemes for its realization have proved futile.

What then is to be the outcome? That depends not a little upon the temper and action of the Senate itself. If senators have foresight enough to discern the cloud while it is yet but the size of a man's hand, the gathering tempest of discontent may be averted. For, in comparison with a rule-ridden House that has ceased to be a deliberative body, a Senate that gave evidence of a sense of responsibility to public opinion might win public confidence. But can self-regeneration be expected of the Senate?

HOW THE PEOPLE ARE USING THEIR NEW POWER OF NOMINATION[1]

Enough direct-primary elections have now been held that the public may see fairly well the virtues and defects of this newest system of political preferment.

The direct-primaries question is one of the big political topics before the people to-day. The country at large is interested in it because a score or more of states have already put it into operation. New York is interested in it because it is a reform which may come in this state, possibly very soon. Governor Hughes is strongly in favor of it, and the whole trend of political thought nowadays is toward it.

Briefly told, the direct-primaries system is one by which the power of nominating candidates for political office is taken from the bosses and the corporations and lodged with the people. It is provided for under state law, and as each state has its own law, there is a slight variation in the different systems. The feature which is common to all the states, however, is that the old party convention is abolished and the candidates are chosen directly by the voters, who go to the polls as though for a regular election.

The different parties vote at the same polling place, but every man is required to declare his allegiance on entering the polls and to vote only

[1] From New York *Evening Post*, 1908.

on his own party ballot. In Illinois last week the Republican ballots were on white paper, the Democratic on pink, the Prohibitionist on blue, and the Socialist on salmon.

Candidates announce their aspirations beforehand, sometimes by advertising in the newspapers. If they expect to have their names printed on the official ballot, they are compelled to file notice of their candidacy with the election authorities. They then throw themselves into the campaign, only instead of its being Democrats against Republicans, it is Republicans against Republicans and Democrats against Democrats.

The Republican who wins and the Democrat who wins at the primaries this summer are pitted against each other in the election which takes place in the fall.

In a state which is pronouncedly of one political complexion, the primary of the party in power is equivalent to an election. In Georgia, for instance, the man named at the Democratic primaries to run for governor is as good as elected. The primaries in Georgia took place this year on June 4, and "Joe" Brown defeated the present governor, Hoke Smith. The election will take place in the fall, but Mr. Brown will not be inaugurated until next spring. Thus Georgia has the peculiar anomaly of possessing two governors for a period nearly a year in length.

Strongholds of Direct Primaries

The South and the Middle West are the strongholds of the direct primaries. The whole Mississippi valley has embraced them, and will never go back to the old system.

Illinois, Oregon, Kansas, Missouri, and Oklahoma have recently tried state-wide primaries for the first time. Other states which have held primaries within the year are Iowa, Tennessee, Arkansas, Louisiana, Texas, and Georgia. Wisconsin and Washington are to hold them soon.

Just as there are people who cry out against our own Public-Service Commission because it does not in a day correct all the abuses which it has taken astute traction men twenty years to build up, so there have been plenty of people after the primaries to declare loudly that they were a failure, and that the entire system would have to be abolished. On careful analysis of the outcry, however, it is pretty clearly established that most of it comes from the politicians and party leaders who have been hurt. This is one of the greatest possible tributes to the efficacy of the system. "I never heard of a politician who was fairly beaten," remarked a shrewd observer the other day, "who did n't yell out that he was beaten by fraud."

On the other hand, there is room for a good deal of severe criticism of the system from its friends. No new institution which practically overturns all existing precedent can be made perfect in one year, or in

five. However, there is not the slightest evidence to show that any state will permit itself to go back to the old system of boss-ridden conventions. The new laws will simply be amended and improved until they are perfect. As De Tocqueville said, "The remedy for democracy is more democracy."

Illinois as a Model

Illinois was generally supposed to have the most perfect direct-primaries law on the statute books anywhere. Hence the result there was watched with interest. Governor Deneen, who obtained the passage of the law, was a candidate for renomination at the hands of the Republicans; and ex-Governor Yates, who had the Republican bosses, the liquor interests, and various disreputable cohorts at his back, was opposing him. As Illinois is Republican by 300,000, the primary would decide the governorship. Deneen and Yates both made whirlwind campaigns, covering the state from Roscoe to Egypt in special trains and automobiles, till the enthusiasm and bitterness of the campaign appeared to be at a white heat. Two other contests of almost equal importance accompanied the campaign, and a host of minor nominations were to be made. What was the surprise, therefore, when it became apparent from the returns that nearly half the voters had gone off golfing or fishing instead of casting their votes.

This was an almost unbelievable fact that nearly 50 per cent of the voters had actually thrown away an opportunity which they had been fighting for before their legislature for years. It is a peculiarity of the human species that he will come to a white heat over muckraking stories, and clamor at the doors of his legislature until he gets direct-primaries laws, but when he gets a chance to go to the primaries and correct abuses by his vote, he behaves like the European prince who made a voyage to Norway to see an Arctic phenomenon which occurred only once a year, and who, on being awakened at 4 A.M. by his valet, said, as he rolled over: "I'll sleep this time. We'll come up and see the sky next year."

It is, then, going to be a serious question how to make sure that the public will come to the primaries and not abandon them to the bosses. It is believed, however, that time will remedy this. One of the greatest secondary benefits of the system is that it compels the candidates to get out before the people; it restores the old-fashioned catch-as-catch-can style of political campaigning, and it stirs up the interest of the people all over the state. In Tennessee ex-Senator Carmack and Governor Patterson indulged in no less than fifty-two joint debates and drove almost every other subject out of the Tennesseeans' minds for a period of three months, in their campaign for the governorship nomination.

United States Senator "Jeff" Davis was compelled to leave the session last spring and go on the stump in Arkansas, where, in the sound

defeat which was administered to him by the Arkansans, the last vestige of political prestige which hung about his person was torn from him. In the preparation for the primaries in the state of Washington, the character of United States Senator Levi Ankeny is receiving the attention of the spot light in an abundance which Mr. Ankeny does not at all relish. And in the recent fight in Kansas, where Bristow and Long waged a mighty battle for the senatorship, with the Stubbs-Leland governorship contest as an extra thriller, the protagonists stumped and debated and press-noticed the state from one end to another, until there was not the remotest hamlet nor the least well-informed old lady who did not know the entire merits of the situation.

The Successful Trial in Kansas

Governor Hoch was too busy arranging Chautauqua engagements to go to the polls and vote, but otherwise nearly every male person of legal age did his duty, the result being different from Illinois's in that respect. There was every reason to feel optimistic over the workings of the new style of nominating, as exemplified in the Kansas performance, and undoubtedly the sentiment of the people was registered with accuracy. Senator Long's record at Washington certainly had not pleased that radical state. He was too tender toward the railroads and the privileged interests, and a little of that goes a long way (in the wrong direction) with the Kansas people. After the returns came in William Allen White wrote in the Emporia *Gazette*:

> The gentlemen's agreement is now a thing of the past. The people will rule. Yet four months ago, in the last Republican convention, the machine won, and Stubbs and Bristow were disgracefully beaten. If they were candidates to-day, they would be disgracefully beaten in a convention. The state convention indorsed Long in March. If it met under old conditions, it would indorse him to-day.
>
> He had the most splendid organization ever manned in Kansas. He had all the campaign fund he needed to spend. He had men to run at his beck and call. But Bristow, without friends, without headquarters, who could order no one around, without even a skeleton organization, won this fight. He spent less on his whole campaign than his opponent spent on postage. The same thing that is true of Bristow and Long is true in a degree about Stubbs and Leland. The machine played politics. They tried to line up class votes. They endeavored to corral the labor vote as such, the old-soldier vote as such, the negro vote as such, the whisky vote as such, and the railroad vote as such.

A Poor Man's Primary

But when the vote was counted, every railroad town in Kansas voted for Bristow and most of them voted for Stubbs. In Emporia, where, under the old system, the bosses could see the tickets the railroad men were voting, the railroad men always lined up for the machine; but under the primary

the railroad men who cheered for Long at the Emporia meeting voted and carried their ward for Bristow. Not a dollar was spent for cigars, nor a hack hired in this town, for Stubbs and Bristow, and it was the same all over Kansas. It was a poor man's primary. The machine had the money, but it did not have the moral sense to see that politics does n't count in a primary box, but, instead, just common, ordinary folks get their views in without reference to class or clan.

The heavy vote polled at this primary proves its popularity with the people. And the fact that the people voted with sense and justice and were not confused on big moral issues shows that Kansas has earned her right to political and industrial freedom. The primary now prevails all over the Mississippi valley, and it will stay as long as universal suffrage. It is a step in the political evolution of the American people. It puts the politician and the public-service corporation out of political business. Eventually it will put the United States Senate and the American courts out of the hands of the law-defying wealth and into the hands of the masses. It is not revolution. It is evolution. But it will fail if selfishness and greed and partisan bigotry get into it. The primary will succeed only as men vote for the good of their neighbors; only as they are broad-minded, self-sacrificing, and brave. For "unless the Lord keepeth the city, the watcher wakens but in vain."

The Expense Argument

Automobiles, special trains, hall hire, postage, and advertising, with all the other incidentals of a furious campaign, are expensive, and the argument has been made that the direct-primary system prevents the poor man from entering the race. This objection ignores the fact that the old system also prevented the poor man from entering the race, unless he was willing to have his expenses paid by the boss and be subservient to the boss's orders. Furthermore, the objection is untrue. The Chicago papers were full of advertisements carrying portraits and recommendations of different candidates, before the primaries, but it is noticeable now that very few of those who had their pictures in the papers succeeded at the polls. This may have been a mere coincidence, but it proves that a man can be elected without spending money in that way. When Mr. Bristow announced his candidacy in Kansas, numberless newspapers throughout the state wrote, soliciting his advertisement, but he wrote back a courteous note to all of them, saying that he would like to spend the money that way if he had it, but, being a poor man, he could not afford any advertising, and must refuse them all. This did not prevent his winning.

One very serious defect is that no law yet developed prevents Democrats from voting the Republican ballot, and vice versa. There are theoretical safeguards against this, but they are not sufficient, as was demonstrated in the Missouri and Illinois primaries. To vote in Illinois, one merely has to be a registered voter, or have his vote sworn in if he is not registered, whereupon he may vote the ballot of the party to which

he belongs provided, (1) he has not signed the petition of a candidate of another party to be voted on at the primary; (2) he has not signed a nominating petition for an independent candidate to be voted for on November 3; and (3) he has not voted the primary ticket of any other party within the past two years. To make the restrictions more severe would make it difficult for the independent voter to get his ballot in. Hence the makers of the primaries law are between Scylla and Charybdis. This is evidently the greatest problem which the situation presents at present.

Behavior of Democratic Wards

In Chicago it was astonishing, not to say amusing, to see how certain preponderatingly Democratic wards cast Republican majorities in the primaries. The reason for this was not difficult to see. The Democrats knew that if the best Republican candidates were nominated, the chance of electing Democrats against them would be zero. Hence their only chance lay in going to the polls and voting as Republicans for the worst Republican candidates. To make the illustration concrete, the Democrats thought that if the Republican Yates could be nominated (instead of Deneen), their own candidate might stand a chance of defeating him in the election next fall. Consequently they flocked to the polls and voted the white ballot instead of the pink. Their own nominee turned out to be ex-Vice President Adlai E. Stevenson, who might conceivably have beaten Yates, if Yates had been nominated; but unfortunately Deneen was chosen on the Republican ticket instead of Yates, despite all their efforts.

When the Chicago newspaper editors examined the ward tables next day they began to exclaim, "What 's become of the Democratic party in Chicago?" If in our famous "gas-house district" here in New York, where Charles F. Murphy's followers abound in the proportion of three to one, there should be a primary in which less votes were cast for the Tammany candidates than for the Citizens Union, the situation would be analogous.

Throughout Chicago the Democratic vote on the governorship totaled 54,973, — this in a city where Edward F. Dunne, Democrat, got 151,779 votes for mayor sixteen months ago.

The total Republican vote was 134,911, or nearly 80,000 majority over the Democratic, — this in Chicago, which is still considered a normally Democratic city.

In the ninth ward, a Democratic fortress, the entire Democratic vote was only 952, while Yates alone on the Republican ballot got 2282. In many other wards the same thing happened. A certain personage at Oyster Bay might be grieved to know that in Chicago's thirty-fourth ward the vote was 119 larger than the record-breaking vote given to Roosevelt in 1904.

It is believed that, without these illegal Democratic votes, Representative Foss would have been nominated over Senator Albert J. Hopkins for the United States Senate, and that John J. Healy, the present state's attorney (district attorney, we call it in New York) of Cook County (Chicago) would have been renominated over Wayman, who led by a plurality of only 729. There is talk of independent candidacies in these two contests.

The Senatorship Problem

Finally, one of the problems which is most perplexing the champions of the direct primaries is that which has to do with the nominating of United States senators. This one problem has made more trouble than all others put together, but it seems to be due chiefly to a certain vagueness on the part of the statute, which allows of various interpretations.

In Illinois and various other states the people's selections for United States senator are only advisory. As the choice of senators comes under the federal law, it cannot be usurped by state law, and the final power to elect still rests with the legislatures. Some of the state laws get around this, however, by electing legislatures at the same time, and requiring candidates for the legislature to abide by the will of the people as expressed at the primaries.

In Oregon the people are anxiously waiting to see whether the Republican legislature will fulfill its pledge to elect Governor Chamberlain, who, though a Democrat, was chosen at the primaries to succeed Senator Fulton in the United States Senate. There is little doubt that the legislature will be true to its promises, but the contemplation of a Democratic senator chosen by a Republican legislature has nearly disrupted the Republican party in that state for the time being. In the neighboring state of Washington, Senator Levi Ankeny wishes to succeed himself, but stands a very poor chance of being chosen in the coming primaries. He is causing the people many sleepless nights by threatening to be a candidate before the legislature, whether he is chosen at the primaries or not. Oregon and Washington have spilled as much ink over these vexatious possibilities as San Francisco has over "graft."

Senator Hopkins received a plurality in Illinois, but Congressman Foss says that he will be a candidate before the legislature on the ground that he carried a plurality of the legislative districts. (Later returns indicate that he did not.) If Foss stays in the fight, so also will ex-Senator "Billy" Mason, who proved a close third in the primaries.

Wisconsin, which holds its primaries on September 1, has a scare on its hands in the shape of Senator Isaac Stephenson. "Uncle Ike" was elected to the Senate two years ago to fill out the unexpired term of Senator Spooner, who resigned. He was elected on the specific pledge that he would be satisfied with the short term and not run again.

Now that the time has come, he has chosen to ignore his promise, at the expense of his friendship with Senator La Follette, and has entered the race.

SENATORIAL DEADLOCKS[1]

From 1895 down to the present there has been only one Congress in which the full membership of the Senate sat. In all the others there were one or more vacancies, due to the failure of state legislatures to choose senators.

At present the Senate's membership is incomplete, the state of Rhode Island having failed, after an all-winter effort of its legislature, to elect a senator in place of George Peabody Wetmore. There was a full Senate for a short time after Delaware had elected Colonel Henry A. Du Pont; then, with the expiration of Wetmore's term and the failure to elect in Rhode Island, the upper house returned to its chronic condition of short-handedness.

The senatorial deadlock is responsible for this condition. The deadlock is a matter of comparatively recent development. There were occasional failures of state legislatures in the early history of the country to elect senators, but until within about twenty-five years these were exceptional. But nowadays seats in the American House of Lords are so highly prized, the stake is so immense, and political feeling runs so high over them, that it is the exception to pick on a date at which all the seats have been filled.

The problem of the Senate looms larger year by year in the American system. In Great Britain there is solemn talk of abolishing their House of Lords. That cannot be done in America. Nothing short of revolution would accomplish it. The complaint against the Lords — in both countries — is that they are not sufficiently responsive and responsible to public opinion.

So it is interesting to note that only a little more than a century ago, when the Constitution of the United States was being drafted, there was serious support for the proposal to have the President name the senators, and name them for life. That was based, of course, on the English system, where the peers are created by royal mandate.

In a century the Senate, which under that system would have come to be a mere reflex of the executive will, has developed so far in the opposite direction that it is now esteemed the chief barrier to the execution of executive designs. Mr. Cleveland despised it, and Mr. Roosevelt simply cannot get along with it. But otherwise the Senate has lived up to the purpose of its founders, who wanted it to stand between the country and an excess of democracy.

De Tocqueville, a French writer on our institutions, said that "the cure for the evils of democracy is more democracy." That theory is

[1] From the New York *Herald*, June 9, 1907. Reprinted by permission.

pretty widely accepted nowadays. But in the times when the fathers of constitutional government were worrying over the Constitution which the rest of us have worried over ever since, the Frenchman's notion had not sunk in very deep on this side the Atlantic. The great fear was of too much democracy. A house of peers, of privilege, of aristocracy, of heredity, — of something exclusive and aloof, anyhow, — was wanted by most of the men who sat in the Constitutional Convention. Only one state, Pennsylvania, voted for popular election of senators, and that state was dominated in doing so by one man, James Wilson. To-day popular election of senators is one of the pressing issues before the nation.

Blockades tie up States

The decision to have senators elected by the state legislatures was a compromise between popular election, which meant too much democracy, and presidential appointment, which meant too little. Nobody dreamed that in time the compromise would result in the senators controlling the legislatures. If some seer could have arisen to tell the Constitutional Convention that this system would bring about a condition in which legislatures would be completely dominated by the responsibility for a senator's election, they would have laughed at him. Yet we have seen it come to pass that the whole legislative business of a state containing more people than there were in the United States at the end of the Revolution has been subordinated and forgotten in the pressure to control the senatorial election. The senators, who were expected to be the creatures of the legislatures, have come to be their masters.

Originally seats in the House of Representatives were more prized by most men than those in the Senate. The full significance of the Senate's participation in the executive power, of its control over patronage and its part in treaty making, were not appreciated. But to-day the people of real consequence in this government are the senators. They make terms with the executive, they control the patronage, and they head the delegations which nominate presidents in national conventions, and, perhaps more than all, they actually control legislation in Washington, particularly all that bears on production and exchange, — a power that cannot be overstated in terms of importance and range.

With this tremendous growth of the prestige and power of the Senate has come the senatorial deadlock, the condition in which pressure upon the state legislature becomes so great as to paralyze it and prevent its performance of the function of senatorial election.

Since 1891 there have been no less than forty-six deadlocks in state legislatures. In thirteen of these cases the legislative session, after many weeks of effort, has adjourned without an election. Only within a short time the legislature of Rhode Island has given up in despair, unable to choose a senator. The Wisconsin legislature has just chosen a senator

after a contest which really began on March 3. The remarkable experiences of Delaware, Montana, Pennsylvania, and Nebraska, as well as other states, hardly need to be recounted to suggest how entirely the business of choosing senators has come to be the overshadowing, all-engrossing function of legislatures. Everything else has been traded off, neglected, or forgotten, in the eagerness to devote attention to this. Not only have nearly one third of these deadlocks resulted in failure to elect at all, but about as many more have ended in the selection of men utterly unknown as senatorial timber, — men agreed on as compromises between bitterly hostile factions, whose availability too often consisted in the fact that they were unknown, untried, untested, unmeasured, had not been far enough involved in the affairs of their communities even to have become identified with their political divisions! Here is a list of the cases of deadlocked legislatures since 1891, which is given by Dr. George H. Haynes in "The Election of Senators," published recently. Dr. Haynes does not pretend that it is a fair representation of this aspect.

Here are the Deadlocks

It is only a list of deadlocks in legislatures. It takes no account of the scores of contests in political conventions and caucuses in which senatorships have been at stake, but from the legislative records alone this list is made up:

Year	State	Days Deadlocked	Senator Chosen
1891	Florida	35	Wilkinson Call
	North Dakota	3	H. C. Hansbrough
	South Dakota	27	J. H. Kyle
1893	Montana	50	No election
	Nebraska	21	W. V. Allen
	North Dakota	33	W. N. Roach
	Washington	51	No election
	Wyoming	51	No election
1895	Delaware	114	No election
	Idaho	51	G. L. Shoup
	Oregon	32	G. W. McBride
	Washington	9	J. L. Wilson
1896	Kentucky	58	No election
	Louisiana	9	S. D. McEnery
	Maryland	8	G. L. Wellington
1897	Florida	24	S. R. Mallory
	Idaho	15	Henry Heitfelt
	Kentucky	36	W. J. Deboe
	Oregon	53	No election
	South Dakota	29	J. H. Kyle
	Utah	17	J. L. Rawlins
	Washington	7	George Turner

Year	State	Days Deadlocked	Senator Chosen
1898	Maryland	7	L. E. McComas
1899	Delaware	64	No election
	Montana	17	W. A. Clark
	Nebraska	50	M. L. Hayward
	Pennsylvania	92	No election
	Utah	52	No election
	Wisconsin	8	J. V. Quarles
1901	Delaware	52	No election
	Delaware	52	No election
	Montana	51	Paris Gibson
	Nebraska	72	C. H. Dietrich
	Nebraska	72	J. H. Millard
	Oregon	22	J. H. Mitchell
1903	Delaware	41	J. Frank Allee
	Delaware	41	L. H. Ball
	North Carolina	10	L. S. Overman
	Oregon	32	C. W. Fulton
	Washington	9	Levi Ankeny
1904	Maryland	16	Isidor Rayner
1905	Delaware	80	No election
	Missouri	60	William Warner

Of the famous deadlocks the series in Delaware incident to the determined effort of J. Edward Addicks to break into the Senate was easily the most famous. It may not be inappropriate to set down here an accurate outline of this contest, which has never before been printed. Addicks began by controlling four or five members of the 1895 legislature, when Higgins was a candidate. Addicks finally agreed that on the last day he would vote his people for Dr. Burton — now a member of Congress — if Higgins would do the same and elect him senator. Addicks carried out his agreement, but Higgins failed, and voted his men for Du Pont, leaving the agreement a failure and the state a vacancy.

After that Addicks worked incessantly and built up a machine in the state. There is no doubt that he spent millions on his ambition to be senator, — how many is only subject for conjecture. At any rate, when the 1896 campaign was coming on, he, in control of the state, had a deal with Quay, Reed, and the other anti-McKinley people, under which he took an uncontested delegation to St. Louis to vote with the anti-McKinley forces. The contest was organized after arrival there, Higgins protesting the Addicks delegation. The Hanna-McKinley people, in complete control, offered first to seat the Addicks delegation if it would split its vote. Addicks, who was for William B. Allison for president, refused, and his delegation was rejected. Four years afterward, at Philadelphia, the Iowa delegation took a leading part in seating another Addicks delegation, simply as a means of paying back the loyalty of Addicks to Allison.

At the 1899 senatorial election the Higgins people refused to enter a caucus and there never was a chance of electing a senator. At the third deadlocked session the Addicks and Du Pont people agreed to elect a senator, — Senator Dick, of Ohio, as emissary from Mark Hanna, arranging the deal. As a result Du Pont and Addicks gave up their personal ambitions and Allee and Ball were elected. At the fourth encounter Roosevelt politics entered Delaware for the first time. Allee had become a Roosevelt adherent, — Roosevelt now being president, — and through the White House influence was induced to cut Addicks and make a deal with Du Pont. Under this deal Du Pont agreed to take the senatorship in succession to Ball and then turn in with all his influence and help reëlect Allee. It was carried out to the extent of electing Du Pont; but being once elected, Du Pont betrayed Allee, just as Allee had betrayed Addicks. Du Pont not only wanted to be senator, but he wanted to be the senior senator, — the real boss. So he refused when the time came to support Allee; he threw his strength to Harry A. Richardson, elected him, and left Allee out in the cold.

And thereby hangs the tale. Allee was very, very sore. He was also very close to the White House. During his relations with the Du Ponts he had learned the secrets of the Powder Trust. After he had been shut out by the Powder Trust's senator he decided to explode that particular trust. So he went to the White House, told what he knew about the powder combine, and forthwith there was announcement that the powder octopus would be prosecuted. The attorney-general is now busily on its trail and this is the real story of the case. Everybody in the senatorial "family" knows it. The senatorial "family" is the group of elder statesmen who are custodians of the traditions, the conscience, and the manners of the upper chamber. The "family" is the most select and exclusive thing in America.

There have been at least two cases in recent years of men getting a clear majority of the votes in a legislature and still not being elected. In 1895, in Oregon, Senator Dolph got the caucus nomination, and in the separate conventions of the two Houses of the legislature was elected. But before the joint convention on the next day enough votes were taken away from him to prevent his getting a majority in the joint convention, and he was never again so near election. In the end McBride was elected. That deal was engineered from beginning to end by Fred Dubois, who on March 4 retired as senator from Idaho. Dubois was a representative of the silver wing of the party, which suspected Dolph of not being firmly devoted to silver's cause. Later Dubois himself "flopped" on this issue and was elected senator a second time in his own state as a Democrat.

The Missouri case of 1905 was similar and is better recollected. Neidringhaus, chairman of the Republican State Committee, received a majority of the votes of each House on the first day of balloting, and that

night received congratulations from all over America, including one from the President. But next day in joint convention he failed to connect with the same support, and within three weeks he was withdrawn from the fight. A scandal about his collection of funds from St. Louis brewers during the preceding campaign was his undoing.

One of the most famous deadlocks was that of 1899 in Pennsylvania, when Quay failed of election and the legislature adjourned without action. The state's governor afterward appointed Quay to fill the vacancy. When the question of accepting his credentials came up in the Senate a number of senators voted to admit him, although explaining that they did not believe it was constitutional. Quay was personally very popular in the body, and this fact was frankly given as the reason why several voted to admit him. The decision rejecting him was made by a majority of one vote, which Hanna cast. Hanna had never forgiven Quay for his activity against McKinley. Afterward Hanna himself stood at the bar of the Senate, charged with bribery in getting his election in Ohio, and Quay voted to seat him. Indeed, in that fight for control in Ohio, Quay was perhaps responsible for Hanna's victory, for he "fixed" a member of the legislature who had once lived in Pennsylvania and been a member of the Quay machine. This man went to Quay to ask his advice and Quay told him to support Hanna. But though he stood by Hanna at that time, Quay opposed him in many instances, especially the statehood matter, and defeated him more than once.

Montana's senatorial deadlocks, like those of Delaware, have centered around the ambition of a rich man to be a senator. The Daly-Clark feud was at the bottom, with the possession of the senatorship only an incident and the control of the great Anaconda Mine as an even greater item.

When Compromises Come

The senatorial deadlocks have often resulted in compromises which sent to the Senate unknown and inexperienced men. Thus in 1901 the leading candidates for the Senate in Nebraska were Edward Rosewater and David E. Thompson, now ambassador to Brazil. The Republican caucus made the remarkable rule that the nominees must have a majority of the entire legislature in order to be nominated, — that is, of the eighty-six Republicans in the caucus, seventy-four must be for the nominee. This made an almost impossible combination, and Hanna, then the Republican national chairman, sent emissaries repeatedly to Lincoln in the effort to have it changed. Thompson and Rosewater were the organization candidates, state and national. But though both came within feeling distance, neither was ever nominated. On the night before the last day of the session, in a perfect riot, Charles H. Dietrich and J. H. Millard, both unknown to public experience, were nominated, and on the last day they were elected senators. As has commonly been true of men thus

nominated by accident, they were not equipped for such careers, and neither made a happy fit in the position.

It would be impossible to make an estimate of the money that senatorial deadlocks have cost. Clark and Addicks doubtless spent more money on their senatorial ambitions than any other men. Quay spent fortunes, but he managed to have "plum trees" handy to shake at the right moment. The Camerons, father and son, spent great sums on politics, and Hanna was accused by the most direct testimony of bribery. Last winter there was a great flurry over charges that Simon Guggenheim, just elected senator from Colorado, had frankly admitted that he supposed his money got him his election. There is a long list of men in the Senate — many of them in no wise discreditable to the body, either — who could not possibly have been there but for their wealth, and a still longer list of those who could not be there but for the wealth behind them. The expenditures, however, by a senatorial candidate to secure election are generally insignificant compared to the immense cost of a deadlock to a state, which pays all the bills for the legislature, its employees, salaries, printing, and incidentals, while it is worrying over a deadlock. As a rule, when there is a senatorial deadlock on, it gets all the attention; other business is quite incidental. On an average, state by state, it probably costs $5000 a day to keep a legislature in session; that is, every day of the contest has cost a year's salary of the senator who was not being elected. It is safe to say that the states pay a good deal more money for the election of their senators than the United States afterwards pays the senators in salaries, — probably several times as much.

There is, of course, insistence in many quarters that the popular election of senators would remedy all of this. Perhaps it would, but it is farther away than ever before. That is the cold fact. Why, it may be asked, has there not been a determined, nation-wide movement to bring about popular elections? Are not most people in favor of the change?

Probably all this is true, but in recent years there has been experience with something that approximates closely to popular election of senators. This is the nomination of senatorial candidates, in the southern states, by direct popular vote in a state-wide primary. The South being overwhelmingly Democratic, the only real contests there are in the Democratic primaries. So the senators come nearer to representing an expression of popular wish than they possibly could under another system.

Under this system of popular nomination by direct vote the South has sent to the Senate such men as Clark and Jefferson Davis, of Arkansas, and has retired such men as James K. Jones and General Berry. It has elected Beckham and Paynter, in Kentucky, over Blackburn and McCrary. It has sent up Overman and Simmons from North Carolina, Clay from Georgia, and others of like character. Now these may be good senators, but they have not impressed the Senate favorably. That is the cold, uncomfortable truth. The elder statesmen say that the "popular"

senator is so eternally busy looking after his popularity — keeping in touch with his people — that he has no time for the business of legislation. They do not like the results of popular election, so far as they have studied them in these instances.

There is no very deep-seated antagonism to popular election in the Senate aside from this view. The notion that senators oppose popular elections because they are fearful of losing their own skins is mainly buncombe. The senator who is already in would, on the average, have a better chance in an election than before a legislature, because he would have the advantage of prestige and acquaintance. It is not so much selfishness as an honest belief that the plan would not give the Senate the best of men that keeps the Senate from adopting the popular amendment resolutions.

The argument may not be very logical, but it serves the purpose of the senators. An analysis of the Senate's membership recently indicated that about one third were utter accidents and another third either rich men or accepted representatives of wealth. But of the "accidents" a number were rated as most useful and effective senators, while of the wealthy men the worst that could be said in half the cases or more was that they were wealthy. Under either rule, in short, of legislative or of popular election there will come good men and poor ones. The worst thing about legislative election is its demoralizing influence on the legislatures. The state all too often gets nothing out of a long and expensive session of its legislature, simply because the senatorial deadlock prevents the body making itself useful.

GOVERNOR FOLK ON BRIBERY LAWS[1]

State of Missouri, Office of the Governor
Jefferson City, March 9, 1905

To the Senate:

The antibribery bill now pending before you is of such importance to the public welfare that I feel I should be derelict in my duty, were I not to call your attention especially to it and give you my reasons for recommending its passage.

This bill, in a different form, has been considered by you heretofore, but failed to receive a sufficient number of votes to pass. Without criticizing those who opposed it, and without questioning their motives in the least, I cannot but believe the purpose of the measure was not fully understood by some of those who voted against it. In order that you may be thoroughly advised in the premises, and to give you such assistance in arriving at a just conclusion as I may be able to, this message is sent you.

This bill compels witnesses to bribery transactions to testify, and exempts them from prosecution by reason of any matter arising directly

[1] From special message, 1905.

or indirectly out of their testimony. It has been claimed that the measure conflicts with the federal and state Bill of Rights, providing that no person shall be compelled to testify against himself in a criminal case. The attorney-general, in an able and clear opinion, now before you, holds there is no such conflict. This constitutional provision has been repeatedly construed, both by our state courts and the federal courts, to mean that no person shall be compelled to testify as to any matter for which he may be prosecuted on a criminal charge. If, therefore, the statute exempts the witness so testifying from prosecution, it accords him every right the Constitution gives. No man has a constitutional right to take bribes or to commit any other crime. The only right conferred in this respect by the Constitution is that one shall not be compelled to furnish evidence to convict himself, or that may be the basis of a criminal prosecution against himself. As the proposed statute makes it so that any person by the act of testifying secures amnesty or pardon, it is clear that the constitutional guaranty is fully satisfied.

Again, it is insisted that although the person testifying as to his knowledge of bribery cannot be prosecuted criminally under this act, he is forced to expose his own infamous conduct, and that it would not be just to thus degrade him. The Constitution never intended to protect a man who commits a crime from disgrace, but only from punishment by reason of his own testimony. One who thinks so little of his reputation as to give or take bribes is not in a position to complain because the law compels him, in the interest of public justice, to tell about it. The man who has not given or taken bribes cannot be affected by the act at all, and the man who has done so has no right to ask that the law protect his reputation. The state has rights as well as those who give and take bribes, and the rights of the state are to have corruption exposed and prosecuted where possible. This right of the state is limited by the right of the criminal not to be prosecuted upon any matter arising directly or indirectly out of his testimony.

The proposed act is not revolutionary or radical. It follows precedents, in this and other states, of long standing. For many years Missouri has had a statute on the books, now Section 2206, Revised Statutes, 1899, compelling witnesses in gambling matters to testify, and providing that their testimony shall in no case be used against them. This statute, in ex parte Buskett, 106 Mo., was held not to conflict with the constitutional provision, that no person shall be compelled to testify against himself, and that the protection given by the statute to the witness against prosecution sufficiently answered the constitutional limitation. The statute was again before our supreme court in ex parte Carter, 166 Mo. 604, where it was held invalid, because the protection afforded the witness by the statute against prosecution was not coextensive with that intended to be furnished by the Constitution. It is clearly implied in this case, however, that if the protection from prosecution had been broad enough, there could have been

no constitutional objection to the act. The Interstate Commerce Law, enacted by Congress, compels witnesses to testify before the Interstate Commerce Commission, affording them the same protection from prosecution by reason of their testimony as the proposed bribery law. The United States Supreme Court, in Brown *vs.* Walker, 161 U. S. 591, held that the act did not conflict with the Bill of Rights, and that a witness could be compelled to testify as to any matter, even though it involved a crime upon his own part, as the act afforded him absolute immunity from prosecution.

Many states have statutes compelling witnesses to gambling transactions to testify, giving them exemption by reason of such testimony, and such acts have been uniformly upheld by the courts. So the act is in thorough accord with well-established precedents.

It has also been urged against the bill that it will compel either the giver or taker of bribes to turn state's evidence. The bill is intended to accomplish this very thing. If there is no informer in bribery, there can be no exposure or prosecution of bribery, for outsiders cannot, from the nature of the offense, know anything about it. While no one can admire an informer, he is more to be credited for telling the truth as to corruption than for concealing it. His condemnation should result from the crime committed and not because he becomes a state's witness. To a considerable extent the prevalence of bribery in this country is due to the imperfect and insufficient means provided by law for its detection. Such provisions as have heretofore been enacted have for their chief object the punishment of bribery. But the boodler must be caught before he can be punished. He cannot be detected unless some other boodler turns state's evidence. To argue against the practice of having some one turn state's evidence is to argue against the exposure of corruption, for there is no other way to do it.

The law is strong enough, so far as punishment for bribery is concerned after it is detected; but the law, as it is now, is infirm and halting when it comes to securing testimony establishing bribery. The first requisite is to discover the evidence necessary to prove the facts constituting the offense. To this end the law should compel bribe givers and takers to tell the truth when called upon, and not allow one to shield the other under a plea of constitutional privilege personal to himself. Not only that, but the law should hold out an incentive in the way of immunity to induce either the giver or the taker of bribes to make a complete disclosure of all the circumstances pertaining to the offense. It would be well to punish all, but as that is manifestly impossible, it is far better that all should be exposed and some punished than the facts never to be known at all.

I regard this as one of the most important measures that has been presented to this general assembly. It is a most necessary weapon for the state in the war against bribery. With it upon the statute books I do

not believe that any will be so bold as to give or take bribes, for all will know that either party may secure immunity from prosecution by giving evidence of the transaction. Bribery, by reason of the secrecy with which it is done, and the fact that all the parties to it are equally guilty, has always been the hardest of crimes to prove. When one man robs another the robber is guilty, the robbed innocent; when one man assaults another the person making the assault is guilty, the person upon whom the assault is made is innocent. In such cases testimony can easily be secured to enforce the law. In bribery, however, the man who gives the bribe is guilty, and the man who takes the bribe is guilty. This fact has always been a barrier to justice and a protection to the offenders, as one could not expose the other without incriminating himself. For many years the necessity of some means of facilitating the procurement of evidence in bribery cases has been recognized. Some have argued that the bribe taker alone should be guilty, and that this would prevent the crime, as no one would take a bribe, knowing that he was committing a felony by so doing, and that the person giving it was free to disclose him. Others have insisted that the bribe giver alone should be guilty. The object sought by these various suggestions was to have only one of the parties guilty, so the state could secure the evidence of the other. The proposed act accomplishes the purpose intended by these suggestions much better, by allowing either side to testify and giving immunity to the person who does testify.

Until the prosecutions were commenced in Missouri, some three years ago, there were only about thirty-four cases of bribery recorded in the books in the preceding hundred years of our country's history. This was not because the crime was uncommon, but on account of the difficulty in securing testimony. In the Missouri cases the policy was adopted of allowing either side to testify without being prosecuted. It was an innovation then, but it has since been followed all over the country, and the result has been that there have been more bribery prosecutions within the past three years than in the century preceding. It is my belief that the proposed statute, if enacted, would make bribery so dangerous that very few would attempt to practice it. While under it all cannot be punished, yet all can be exposed. And after all, in the cure of corruption exposure is the main thing. While the punishment of the guilty is desired, it is far better to have exposure without punishment than punishment without exposure, if such a thing were possible. The result of a crusade against corruption cannot be measured by the number of men in stripes, but can only be gauged by the quickening of the public conscience to the necessity of stamping out the things that dishonor. The remedy for corruption in its last analysis is in the sense of popular rectitude. It has not been many years since bribery was not considered seriously. Then came the revelations and the realization that it is an offense that, if tolerated, will undermine and destroy free government. Missouri's fight against

this evil is going to be kept up with never-ceasing vigor. The sentiment against bribery is in the hearts of the people of this state, and can never die.

The proposed measure is an important help in the eradication of corruption, for it strengthens the law where it is feeblest, and will do more than anything else to put a stop to bribery.

Respectfully, Jos. W. Folk, *Governor*

THE STATE BOSS[1]

The political boss of any state, when fully developed, is readily recognizable by the public. Not only is he known individually, but his general characteristics and powers are estimated correctly. He is not popular with the people, not even with the rank and file of his own party. The "workers" like him, the party machine yields him a cheerful obedience, the legislature does his will; but the masses distrust him. He elects mayors, governors, legislators, but he himself can be elected to no office in the gift of the people. When he attains office, as he often does, it is by executive appointment or through the agency of a legislative body. The one high office open to him is that of United States senator, as is evident from the political history of the states of Pennsylvania, New York, Maryland, and Ohio.

The devil is said to be persevering, and, no doubt, finds the one good quality essential to the success of his calling. In like manner, and unquestionably for a like reason, the boss has the single virtue of being true to his word in all business transactions. Whether acting as the paid agent of an individual or a corporation, or whether dealing with sub-bosses and heelers, his promises are to be relied upon. Only in his relations to the public does the rule not hold good. The people he fools and deceives unhesitatingly and openly.

What is the cause of bossism? Why is its power constantly augmenting, its field continually widening? Or, to put the case more definitely, by what means is the state boss able to name the governor and dominate the legislature of his state?

His immediate source of power is control of the state organization of the dominant political party.

It will be observed that, with scarcely an exception, the party dominant in any state is the one which has the most money. Occasionally the impoverished opposition wins a victory, but it is temporary at best, and usually but partial. In the southern states the Democratic party is in permanent ascendency; in the New England, Middle, and Pacific states, and in a few of the Rocky Mountain states the Silver party is, or has

[1] From article in *Century*, 1903, by ex-Governor L. F. C. Garvin of Rhode Island. Reproduced by permission.

been, dominant; but everywhere it is the richer party. This portentous situation is due to the fact that money counts more and more every year in determining the result of political campaigns. A strong party organization, covering every section of a state, entails a large expenditure. The money comes chiefly from candidates, the holders of lucrative offices, and the beneficiaries of legislation, all of whom are to be found in much greater numbers and stimulated by much higher hopes in the permanently dominant party.

The distribution of the large sums derived from these several sources is not made by the contributors themselves, but through one individual, the boss. He determines the destination of the fund, in what directions it shall be paid out, and from whom it shall be withheld. Reputable candidates, aware that their contributions to the campaign are to be used corruptly, do not desire any itemized account of expenditures. All they ask for is the delivery of the goods.

Just how a state boss controls a legislature was once explained to a company of gentlemen in my presence by Benjamin F. Thurston, Esq., of Providence, Rhode Island. . . . The *modus operandi* when, for instance, the boss wished to get rid of a troublesome state senator, was described as follows: When, a few weeks before the campaign opened, a wirepuller from the obnoxious senator's town called, according to custom, to see the boss, a conversation of the following nature would ensue:

Boss. Can't you send up for senator a better man than Mr. A?

Wirepuller. Oh, no. He 's very popular, and, besides, it is the custom of our town to give senators a second term.

Boss. It 's a nice day.

Wirepuller (*after a long pause*). How will it be about funds this election?

Boss. Oh, there will be no money this year.

Whereupon the visitor, taking his departure, indulges in a brown study; but about a week later he appears again, when the same topic of conversation is revived.

Boss. So you are going to reëlect Senator A, are you?

Wirepuller (*hesitatingly*). I suppose so. It would be hard work to beat him in caucus.

Boss. Can't B defeat him in caucus?

Wirepuller. Perhaps so, but it would take a lot of money.

Boss. Oh, you can have all the money you want for that purpose.

From this typical conversation it may be understood how the manager of the dominant party, by holding the purse strings, can easily keep a majority of both branches of the legislature subservient to his will. In the event of his failing to defeat an objectionable candidate at the primary meeting, he is ready to furnish money for use against him at the polls, and in this way not infrequently to secure the services of

his successful opponent. Every powerful boss has at his disposal, in a pinch, some members of the legislature, who nominally belong to the opposition party.

With a boss at the head of a state machine, acting through subbosses, each of which is intimately acquainted either with a city or with an extensive rural community, it is easy to see how he can force a state legislature to enact unpopular laws and to elect a United States senator who is not only offensive to a majority of the entire electorate, but who is far from being the choice of a majority of the members of his own party. By the lavish but judicious outlay of the campaign fund, in packing caucuses, hiring workers, corrupting active opponents, bringing out the vote, and, when necessary, bribing the voters, it is manifest that the will of the people finds but a small chance of gaining its ends through an ordinary election.

Only in extraordinary times, when public sentiment is stirred to its depths, when citizens, usually indifferent, devote time and thought and some money in support of a popular movement, — only on such exceptional and infrequent occasions is the supremacy of the boss really endangered. When, after a long interval of quiescence, such a period of awakening occurs, it too often happens that the immediate grievance felt by the public is a comparatively small one, and the remedy applied, though for the time effectual, is only superficial. The temporary vigilance soon passes; that slow-moving giant, the public, goes to sleep again, and the boss resumes undisputed sway.

The stronghold of the state boss is the legislature. When he selects a candidate for governor or other elective executive officer, he finds it necessary in most states to take into account the voters. The largest constituency in the state is the most difficult to deceive and the most costly to corrupt. Moreover, the people have something of a prejudice in favor of a respectable figurehead as candidate for governor, and even for mayor. They have been known, in so boss-ridden a state as Pennsylvania, to stampede to the opposing candidate. But the bosses are not greatly distressed at losing a governor, since the real power in a state, the legislature, is rarely carried in both branches, by popular uprisings, however extended. The boss of any state, if able to retain control of either Senate or House of Representatives, frequently manages to carry his pet measures through the other branch; and, at the very worst, he can hold radical reforms in abeyance until after another election, at which he is quite sure to find, the energy of the public being exhausted, an easy victory all along the line.

The distribution of campaign funds by the boss is supplemented by his equally shrewd distribution of salaried offices. But even though civil-service reform were fully established in any state, the boss, if well supplied with the sinews of war, would find no difficulty in maintaining his hold upon its policies.

IX

CONSTITUTIONAL CONVENTIONS

THE NEW YORK CONSTITUTIONAL CONVENTION[1]

By Hon. J. H. Hamlin

Before adverting to matters accomplished by the convention, something as to its inception, organization, and general characteristics may be desirable. The authority for its existence was embodied in the former constitutional provision that in the year 1866, and in each twentieth year thereafter, the question should be submitted to the electors of the state to decide, Shall there be a convention to revise the constitution and amend the same? If the answer should be in the affirmative, the legislature was required to provide for the election of delegates. Pursuant to this mandate the question was submitted to the electors in 1886 and they decided with practical unanimity in favor of a convention. Partisan considerations, however, controlled subsequent legislative action on the matter, and no provision was made for the meeting of a convention until 1892, when an act providing for the election of delegates, to meet on the second Tuesday of May, 1893, became a law. Political considerations again intervened, and in 1893 the act of the preceding year was substantially amended out of existence, and a new statute took its place. The act of 1892 had very closely followed the provisions of the law which had summoned into existence the convention of 1867; each of them provided for 32 delegates, to be elected from the state at large, with a proviso that no elector should vote for more than 16 of the delegates, thus establishing minority representation. The result of this method of election was highly satisfactory. It brought into the convention of 1867 men of commanding ability, belonging to each of the two great political parties. For political reasons, which ultimately recoiled upon the party responsible for the change, this provision was annulled. The act of 1893, under which the convention came into being, provided for 175 delegates, of which 15 were elected from the state at large and 5 from each of the 32 senatorial districts. Accordingly, at the fall election party machinery was put in motion, nominations were made in the usual way, and delegates elected to the convention, which met at Albany on the second Tuesday of May following. Politically the Republicans

[1] From *Yale Law Journal*, June, 1895.

were in the majority. Of the 175 members elected, 98 were at least nominally Republicans and 77 Democrats; very few, however, were professional politicians. Political affiliations, indeed, played no great part in determining the action of the convention; in only a few instances were amendments carried or defeated by a strict party vote.

Professionally three fourths of the delegates were lawyers. A large number of them were liberally educated. Not a few had gained a wide reputation at the bar. As a whole they were men of ability and high standing in the communities where they resided, and they had a high sense of the responsibilities and duties of their position. In the selection of a presiding officer the convention was supremely fortunate. In the person of Joseph H. Choate was found one whose attainments and abilities reflected honor upon the convention and dignified its proceedings. His delightful tact disarmed criticism, whatever his rulings; and that unfaltering courage in maintaining his convictions, which especially characterized him, gained for him, even more than the charm of his eloquence, the admiration of the convention. At the head of the judiciary committee was Elihu Root, whose infinite capacity for labor, added to his great abilities and acquirements as a lawyer, enabled him to impress himself upon the work of the convention to an extent unapproached by any other member of that body.

Early in its session the convention was called upon to assert and maintain its prerogatives. A writ of prohibition was issued out of the supreme court upon the petition of one Herman F. Trapper, a sitting member, whose seat was contested on the ground of gross frauds committed at one or more of the election districts within the city of Buffalo, from which he was returned. The writ assumed to restrain the convention from taking any action which should interfere with or abridge in any way his rights and privileges as a member, and required it to desist from proceedings in the matter of deciding upon his qualifications and election. The writ having been personally served upon each of the delegates, two questions were fairly presented: first, as to the right of the convention to pass upon the election and qualification of its own members; second, whether the convention was inferior to the supreme court.

Considering it to be of the first importance that a body chosen to revise the organic law should be free from interference, whether by the executive, legislative, or judicial branch of the government, the convention repudiated the action of the court and asserted its rights as an independent legislative assembly, with plenary powers within its sphere of action, which it derived directly from the people. As a corollary to this proposition, it maintained that the right to judge of the election and qualification of its members was essential to its efficiency, and that interference from without, in this regard, would be destructive to its independence and the proper performance of its powers. The convention caused a copy of the report adopted by it to be transmitted to the

supreme court, together with a respectful remonstrance against its entertaining jurisdiction in the matter. As nothing further was heard of the proceeding, it is to be presumed that the court, on consideration, adopted the views of the convention.

Having maintained its prerogatives, the convention proceeded to perform the work for which it had been summoned. The constitution of 1846 had for nearly half a century served as the great charter of the state. At the time of its promulgation forebodings of the ills likely to accrue to the body politic from its adoption were everywhere heard. It was bitterly assailed as extreme in its democratic tendencies and as practically revolutionizing the policy of the state with its decentralization of political power and its elective judiciary. But the event has not fulfilled the dire predictions. It did, indeed, in the words of the address which accompanied it, "place the happiness and prosperity of the people of the state under God in their own hands"; but the people have seen to it that no great detriment occurred to the state thereby. We have under its sanction advanced with unprecedented rapidity in population, wealth, and power, and, on the whole, the high character of our judiciary has been well maintained.

The convention of 1894 was not inclined to radical measures. It appreciated the excellence of the existing constitution, very many of whose provisions had received judicial construction. In the main it was known to be acceptable to the people of the state, and it was deemed to be the part of prudence to modify the old constitution only so far as changed conditions had rendered it desirable. But this conservative action was not accepted without resistance by the reformers both within and without the convention. At the time when the air was thick with socialistic schemes for regenerating political life, it was not to be supposed that the convention would escape the enthusiastic doctrinaire and the professional reformer. They were present in force and brought their amendments with them. Scarcely a provision of the old constitution seemed satisfactory to every one; even the preamble and Bill of Rights, which were supposed to be fairly acceptable, were asserted to be radically defective. Something over four hundred and fifty proposed amendments of the most diversified character were submitted to the convention for its consideration. Fortunately the delegates, as a whole, were a conservative body of men. They fully appreciated the fact that in the attempt to reform abuses, the abuses of reformation were to be avoided. Out of this mass of material only thirty-three amendments were presented to the electors for adoption.

THE MICHIGAN CONSTITUTIONAL CONVENTION[1]

By J. A. Fairlie

It was in April, 1906, that the people of Michigan voted that a convention to revise the constitution should be held. The necessary act of the legislature to provide for the election of delegates might easily have been passed early in the session of 1907, and the delegates elected at the April election of that year. But the act was not passed until towards the end of the session, the delay being perhaps due to the hope of some members of the legislature that they would be returned as delegates. A ruling of the supreme court, however, declared members of the legislature ineligible, under the provision of the existing constitution declaring them ineligible for appointment to any office created by the legislature of which they were members.

The act for the election of delegates provided for a body of 96 members, 3 to be elected from each senatorial district. In districts where the direct primary had been adopted, primaries were to be held on August 13. The election of delegates was set for September 17. The convention was to meet on October 22. Delegates were to receive $10 per day until January 31, but might sit beyond that date without pay. Other provisions in regard to the organization and procedure of the convention were added. Some of these, it has been urged, were beyond the authority of the legislature to impose,— such as the provisions that the revised constitution should be submitted to the electors as a whole, and that it should be submitted at a special election in April, 1907. On the latter point the supreme court has recently decided that the legislature did exceed its power.

Direct primaries for nominations were held in about half of the districts. Both at these and at the election of delegates in September a very light vote was cast,— the more surprising in view of the large vote in April, 1906 (over three hundred thousand) on the question of calling the convention. But in explanation of this light vote it may be said not only that the election was set for a special date, but that it came at an unusual time, the primaries in the middle of the summer. Another factor was the absence of active campaigning on the part of most of the candidates, the general consensus of opinion being that the usual political methods were out of place for this purpose.

It has been said that the members of the convention constituted the best and most representative assembly that has ever met in Michigan. It is at least clear that among the delegates were to be found men representing all classes of the population and wide differences of opinion; that most of them were men of intelligence and training, and a good proportion were men of the first order of ability; and that they worked earnestly and seriously in the task before them.

[1] From *Michigan Law Review*, 1908.

Sixty delegates were recorded as lawyers, whereas in the convention of 1850 a majority were farmers. Twenty were business men (including several wealthy capitalists, some bankers, and 5 manufacturers), 7 were farmers, 2 were publishers, 2 were professors in educational institutions, and there was 1 clergyman and 1 carpenter. Forty-four members had been students at the University of Michigan, and a number of others had a college education at other institutions.

From a party classification the convention was overwhelmingly Republican, with only eight delegates elected as Democrats. But while on several important questions the convention was very closely divided, the regular party lines were not in evidence. To some extent the convention could be separated into a radical and a conservative group; but a middle group held the balance of power, and the final result was at least acceptable to all the members of the convention.

A good proportion of the delegates had previously served in the legislature or in other public posts. On the other hand, a large proportion had never before held public office, and among these were some of the ablest and strongest members, whose presence emphasized the importance of the work to be done.

Some preliminary canvassing for officers took place, but no formal caucus was held, and at the first session (October 22) John J. Carton, twice Speaker of the Michigan House of Representatives, was unanimously elected president. After electing the other most important officers a committee on permanent organization and order of business was appointed, which reported a plan of committees and employees, and was also made use of during the convention as a central committee to consider and report on important questions of convention procedure.

One of the first committees to be appointed was the committee on rules, on whose report a series of rules was adopted, based mainly on those of the Michigan House of Representatives, but modified in several important features, so as to provide more ample opportunity for discussion and deliberation. The regular procedure for proposals deserves especially to be noted as follows:

1. Introduction, first reading, and reference to a committee;
2. Report of committee and placing in the general order;
3. Consideration in committee of the whole in order of reference;
4. Report by committee of the whole, and reference to the committee on arrangement and phraseology;
5. Report of committee on arrangement and phraseology;
6. Second reading, vote on passage by roll call;
7. Reference to committee on arrangement and phraseology;
8. Report of the complete revision by the committee on arrangement and phraseology;
9. Consideration of the complete revision in committee of the whole, by sections;

10. Report of the committee of the whole;

11. Third reading and passage (on roll call) by articles and as a whole.

Special attention may be called to the four different opportunities for discussion and amendment of every part of the revision in the convention and to the double reference to the committee on arrangement and phraseology.

Other rules that may be noted were those providing for the reading and printing in full of all proposals, and reserving the power in a majority of the convention to discharge any committee from the consideration of any proposal.

Twenty-eight standing committees were appointed, each having from 5 to 15 members, giving 3 committee places to most members of the convention. The largest committees, and the most important, were those on the legislative department, the judiciary, cities and villages, public-service corporations, finance and taxation, and submission and address to the people, — each of 15 members. The committee on miscellaneous provisions had 13 members; the committees on executive department, private corporations, education, and liquor traffic had each 11 members; and the committees on counties and townships had each 9 members.

Before appointing the committees the president invited the delegates to indicate their preferences, and these were apparently followed as far as possible. Among the chairmen of the more important committees may be mentioned Henry M. Campbell, legislative department and permanent organization; R. H. Fyfe, the judiciary; Alfred Milnes, cities and villages; A. E. Sharpe, public-service corporations; Roger I. Wykes, finance and taxation; Victor M. Gore, submission and address to the people; E. J. Adams, miscellaneous provisions and rules; Delos Fall, education; and A. L. Moore, liquor traffic. Most of these were delegates of large influence in the convention, but other members also played a prominent part.

Much of the important work of the convention was accomplished in the committees, and of this work detailed records are not available. For more than two months the convention as a whole held only afternoon sessions, leaving the mornings and evenings for the meetings of committees. At these meetings the many proposals (over four hundred were introduced) were discussed more thoroughly and with greater freedom than was possible in the larger assembly. These committee discussions were supplemented by the even more informal discussions of groups of delegates, who would gather in the intervals between more formal meetings to talk over one problem and another. The committees also received the petitions which were addressed to the convention, and all of the more important committees held one or more public hearings for the discussion of special questions by those not members of the convention. And the result of the committee work, while in no case depriving the convention

of its full control over any subject, was that on many matters the conclusions of the committees were accepted with little or no debate in the convention.

On a few questions larger, but still informal, conferences of those interested in a particular question were held. On one occasion a conference committee was appointed, through the action of the convention, in an attempt to reach a compromise agreement in regard to the "initiative." This conference committee did not fully succeed, but it led indirectly to the result finally adopted.

At the outset of the convention it was decided that a complete stenographic report of the debates and proceedings should be made and published. Owing to delay in the printing, the daily reports were not available, as some expected, for following the current work of the convention. But the postponement of the vote of the electors on the revised constitution until November gives an opportunity to examine the complete record and to trace the proceedings of the convention from its beginning to the end. And, with all the attention given to the convention by the newspapers, it must be said that a close study of the debates will be necessary to give anything like an adequate comprehension of what was said and done.

During the earlier weeks, while most attention was being given to committee work, there was little talk and no long speeches. But after the New Year, when the convention was holding two and three sessions a day, and the important questions had been reported for action, the record rapidly lengthened. Half a dozen subjects were made the occasion for extended debate. The most prolonged was that on the initiative for constitutional amendments, which continued for four days, and in which more than fifty delegates took part, — doubtless the longest debate in the history of Michigan. Other subjects which received special attention were the questions of salaries, prohibition, woman suffrage, and the modification of the fellow-servant rule.

It is notable, however, that most of the changes actually made in the constitution were agreed to without long discussion; and what seemed to many the most important of all, the home-rule provisions for cities and villages, were adopted in committee of the whole after but three sessions, and with only brief speeches on the various sections, instead of lengthy orations on the whole subject. Towards the end of the convention a rule was adopted limiting speeches in committee of the whole to five minutes, and for the last few days the same rule was voted for the convention; but this rule was not infrequently waived by unanimous consent, and there was no effort to suppress the free discussion of any question.

As a whole, the convention gave ample but not an excessive amount of time to speech making, and the record of the debates will be considerably shorter than that for the convention of 1867.

A few words may be added as to the work of the committee on arrangement and phraseology, which exercised a larger influence on the language and arrangement of the constitution than has been usual in state conventions. Every section of the revised constitution, as agreed to in committee of the whole, was referred to the committee on arrangement and phraseology to recommend such modifications in the language as seemed advisable, before the passage of the sections on second reading. The committee made its recommendations freely, rewriting a good number of sections and sometimes entirely reconstructing several sections; and it had the satisfaction of having every one of its recommendations adopted by the convention.

After the various sections had passed second reading they were again referred to this committee for arrangement in the different articles of the complete revision. When this stage had been reached the convention adjourned for twelve days, which gave time for this work to be carefully done, and also permitted the elimination of duplicate and conflicting clauses and further changes in language to be considered and recommended. As a result it is believed that the grouping of the articles and the arrangement of sections in each article is more logical and will help to a clearer understanding of the relations of the various provisions to each other. And while the new constitution inevitably shows signs of the many hands that shared in its construction, there is more uniformity and less duplication and conflict of provisions than might well be expected in a document which is the composite result of so many men of different minds.

The final week of the convention was given to the consideration of the complete revision, and some further amendments were made in committee of the whole and on third reading. And as the outcome of the thorough consideration and the spirit of concession and compromise on the most controverted questions, on the final vote on the whole constitution (on February 21) not a single negative vote was recorded, — a result believed to be unprecedented in the history of constitutional conventions, and one which should strongly commend the new constitution to the people of Michigan.

It may be hoped that the convention procedure and methods of business will have a permanent impress on the future conduct of legislative business in this state. It is true that all the convention rules and practices cannot be fully applied to the larger volume of statutory measures that must be considered at each session of the legislature. But the general principles of publicity, thorough consideration, and careful attention to forms of expression and arrangement can well be more closely followed than they have been; and, if this result is secured, it will be not the least benefit received from this convention.

GENERAL TENDENCIES IN STATE CONSTITUTIONS [1]

By James Quale Dealey

Throughout classical and medieval philosophizing runs a theory of a paramount or fundamental law, permanent in kind, because fixed in nature. This theory in its modern form, after voicing itself for a time in the Cromwellian period, came to the front in the American Revolution and found its proper expression in the written constitution. In our federal system, owing to the rigidity of the national Constitution, the development of that document must be traced in the varying decisions of the Supreme Court of the United States. In the commonwealth a more flexible system of amendment prevails, and for that reason changes in what the states consider to be their fundamental law may be traced more easily in the constitutions themselves, subject as they are to frequent revision and amendment.

In the Revolutionary period these constitutions were few in number, small in size, and contained a mere framework of governmental organization. Since that time some two hundred state constitutions have been made or revised. The forty-five now in force average in length over fifteen thousand words, the longest, that of Louisiana, having about forty-five thousand. In place of fundamentals only, they are filled with details, so petty in many instances as hardly worthy even to be dignified as statutory.

This tendency to enlargement is not without justification. The proper solution of problems arising from the complexity of modern interests demands more wisdom and knowledge than is usually found in legislatures, which are often incompetent and sometimes venal. The democratic demand for legislation through convention is really a demand for legislators of a higher grade. To legislatures in consequence are left the mere details of legislation with a minimum of discretion in the formulation of statutes. Their ability in this sort of thing is well seen in the biennial output by the states of nearly twenty thousand statutes, three fifths of which are local, private, or special in kind.

Our present state constitutions represent different stages of development and may be divided in four sets: (1) the six New England constitutions; (2) the ten made during the twenty-five years ending with 1865; (3) the fourteen made from that date up to 1886; and (4) the fifteen new and revised constitutions of the last twenty years. Three more will likely be added to this number within the next twelve months, and an average of one per year may be expected from that time on. The process of amendment, through which about twenty additions are made annually to our constitutions, tends to modernize all of these.

A comparison of these sets shows that the starting point for the study of state constitutions is the article on the lawmaking department. This

[1] From *American Political Science Review*, February, 1907.

powerful body in Revolutionary days completely overshadowed the other two departments and was practically the repository of the sovereign powers of the state. Though the theory of the separation of powers was held, all really important powers were in fact intrusted to the legislature. This is by no means the present condition. Not only have the other two departments been built up and strengthened at the expense of the assembly, but three other departments of government have developed into importance, and should be considered in any discussion of the division of sovereign powers. If the government is that organization through which all the sovereign powers of the state may be expressed, then surely in modern times we should speak not merely of the three historic departments of government, viz., the executive, the judicial, and the legislative, but also of the differentiations from these, the administration, the electorate, and that nameless agency which in every state has the legal right to formulate the fundamental law, an agency which, for want of a better name, may be called the *legal sovereign*. These six departments unitedly may exercise every conceivable power included within the term "sovereignty."

The general tendency in regard to these six departments of government, as shown by our existing constitutions, will be indicated in order, and then attention directed to the lengthy series of limitations placed on the exercise of other powers not removed from legislative discretion.

I. *Administration.* Historically, administration is of course part of the executive function, but in our Revolutionary period it was at first controlled, and in part carried on, by the legislatures. This was done through committees, temporary and then permanent. The work performed by these was gradually transferred to paid officials, who, as functions became specialized, were organized, for the purpose of carrying on the work of administration, into the numerous boards, commissions, and departments of government. Most of our states are still in this stage of development. Every new line of activity results in the formation of a special board or department, the organization and powers of which are frequently defined in the constitution. This also regularly provides for the election by popular vote of the heads of the chief administrative departments, such as the secretaries of state and of the treasury, the comptroller or auditor, and the superintendent of education. As these numerous boards and departments really perform the larger part of the governmental business, it is surely advisable that the several articles and provisions of the constitution be gathered together and placed under a separate heading, entitled Departments of Administration. Their functions also should be coördinated, unified, and thoroughly supervised. The absence of such centralization is perhaps the greatest weakness in local administration. Supervisory control over such bodies by legislative committees tends to become merely nominal, with the inevitable consequences of inefficiency and lack of economy. There is, however, a strong tendency to center such powers in

the executive, making him the head of the administration as in the national system. This is done by bestowing on him large powers in appointment and removal, authority to demand reports and to investigate the management of departments.

II. *The executive.* Aside from control over administration, the chief gain in power on the part of the executive is his veto over legislation. In 1788 two states only had placed the veto power in their constitutions; at this time but two states withhold it. Thirty-one states adopt the national fraction of two thirds of both Houses to override the veto; the other twelve prefer a majority or three fifths. Thirty states now allow the governor to veto items of appropriation bills, and three of these also allow him to veto part or parts of any bill. If adjournment intervenes between the sending of a bill to the governor and its return approved or vetoed, ten states allow the governor a period of from three to thirty days to decide whether or not to approve such bills. Eighteen states allow him to file objections with the Secretary of State, thereby defeating the bill. The veto power, especially when strengthened by the power to veto items and to approve or disapprove after adjournment, has aided greatly in the enlargement of the importance of the executive and in the conservation of public interests.

The governor's term of office is four years in twenty-one states, two years in the same number, three in New Jersey, and one year in Massachusetts and Rhode Island. The office of lieutenant governor is still retained in thirty-two of the states. He presides over the Senate in thirty of these. In Massachusetts and in Rhode Island he is a member of the council, or of the Senate, ex officio, but presides only in the absence of the governor, who, by constitution, is presiding officer. The old-fashioned executive council is still retained by three of the New England States, and a modified form of it in North Carolina. Iowa, by statute, has an executive council made up of the governor and the heads of three departments.

III. *The judiciary department.* The older constitutions disposed of this department in few words. Discretionary power was conferred on the legislature, and judges, appointed by governor or legislature, usually held a life tenure. The newer constitutions completely reverse this practice. The courts in the United States do not simply decide cases; they interpret finally the constitution, and to that extent are a political factor. For this reason complex business conditions and the rise of corporate interests necessitate much more attention to this department of government. The constitution of Louisiana, for instance, devotes about twelve thousand words to the courts of the state and of the city and parish of New Orleans. The newer constitutions regularly outline the grades of courts, define their powers, set the boundaries for judicial districts, and regulate the number and tenure of the judiciary. Three of the original states still retain a life tenure, but all others fix a term of years for judges of the supreme court; the term varies from two to twenty-one

years. Twenty states favor the six-year term, eight and twelve years are the terms next favored, three states have long terms, and Vermont a two-year tenure. Six states only retain appointment through the governor, aided by council or Senate. Four choose through the legislature and one (Connecticut) nominates through the governor, and elects through the assembly. The other states all elect their judiciary and show no tendency in the other direction. Four of the New England States still allow the governor or assembly to ask the supreme court for opinions on questions of law, South Dakota and Florida allow the governor this privilege, but all the other states with greater wisdom reject this provision. There is a marked tendency in the constitutions to merge law and equity into a common procedure, to modify the jury, to define libel, and to safeguard the exercises of eminent domain by quasi-public corporations. All these tendencies unitedly show a strong determination to make the judicial system responsible directly to the electorate.

IV. *The constitutional convention.* The modern theory of a fundamental law, and its embodiment in the written constitution, have necessitated the development of a governmental agency for the express purpose of formulating the fundamental law. Two forms of this agency are in use among the states, — the legislature and the convention. (1) The legislature in the performance of this office is not properly a legislature, but a convention. This is shown by the fact that its recommendations are not sent to the governor for his approval or veto, but to the electorate for final decision. The older method of amendment was through the action of two assemblies and large fractional votes by assembly and electorate. At the present time action by one assembly is sufficient in twenty-six states, eighteen still require two assemblies, and the remaining state (New Hampshire) amends only in convention. All but Delaware use the referendum for final decision. Seventeen of the constitutions still require a two-thirds vote of both Houses on amendments; seven, a three-fifths vote; in sixteen a majority is sufficient. Only two states require more than a majority for referenda, Rhode Island (three fifths) and New Hampshire (two thirds); the usual requirement, that of twenty-eight states, is "a majority of those voting thereon," but a few make amendment well-nigh impossible by requiring a majority of the electors or a majority of those voting at a general election.

(2) Few seem to realize the importance of the constitutional convention in American state governments. It is the great agency through which democracy finds expression. In its latest form, that of a body made up of delegates elected from districts of equal population, it is one of the greatest of our political inventions. Through it popular rights may be secured in the constitution, legislative tyranny restrained, and powerful interests subordinated to the general welfare. Not that these objects have as yet been attained, but the agency is here through which an enlightened public opinion can express itself.

All but thirteen of the states expressly provide for the calling of a convention. In twelve of the thirteen, conventions can be called under legislative authority. In one state only (Rhode Island) is there doubt about the matter. Its supreme court in 1883, when requested by the Senate for an opinion, in its reply concluded that under the constitution a convention could not be called. Judge Jameson, however, in his great work on "Constitutional Conventions," in discussing this opinion reaches the opposite conclusion. If the composition of the convention is mentioned at all in the constitution, the usual provision is that it be made up of representatives from districts of equal population. There are, however, a few exceptions. Since the year 1890, under the older theory that the convention is the repository of sovereign powers, five constitutions have been promulgated by conventions without referendum. To check this possibility, fourteen constitutions expressly require the referendum, and the other states would likely do so by statute.

V. *The electorate.* If this body, instead of being referred to as the "sovereign people," should be treated, from the legal standpoint at any rate, as a governmental agency, clearness in discussion would be gained. Under the constitutions this governmental agency has three sets of powers: (1) the power of appointment to certain offices through elections; (2) the power to assist in lawmaking through the referendum, and to some extent through the initiative; and (3) the power to assist in judicial decisions through service on jury. These powers are steadily increasing through the agency of the convention. The chief officials of the state and municipality, the lawmakers of all grades, and judges supreme and inferior are now regularly elected by popular vote. The verdicts of juries now are often made by a fraction of the whole instead of by unanimous vote. The referendum is generally required for final decisions on fundamental law, and very largely on local and general statutes. The most remarkable development of this power may be found in the constitution of Oregon since its amendment in 1902. By this the power of initiative and referendum is fully secured to the electorate, both in statutory and constitutional provisions. These powers of the electorate are plainly specified in the constitutions and are clearly governmental in kind, as truly so as any other of the agencies of the state.

The usual basis for membership in the electorate is that to be made citizens of the United States they must be at least twenty-one years of age. Nine states still allow aliens to vote who have declared their intentions to become citizens, four states grant suffrage to women, eight states have a slight educational qualification, six other states have an educational qualification as one of several alternatives, and three of these introduce a property qualification as an alternative, but otherwise this historic restriction survives only in Rhode Island, in the election of members of city councils.

VI. *The legislature or general assembly.* The Revolutionary constitutions differed widely in respect to the organization and membership of

their legislatures. Very noticeable, however, is the present tendency to approximate toward a common type. In all the states the legislature is bicameral. Thirty-eight states elect the members of the House biennially; senators have a four-year term in twenty-nine states; and twenty-four provide for a system of class rotation in the Senate. A biennial session is required in thirty-eight states, and thirty-one fix actually or practically a time limit for legislative sessions: this in eighteen states is fixed at sixty days. The membership of the state legislatures is unitedly about seven thousand, but nearly two thousand of these are found in the seven states that have assemblies of over two hundred members. The size of the membership in each House naturally varies with the population of the state, but if the seven mentioned above be omitted, the general average is a membership of about thirty-five in the Senate and ninety in the House. The House membership is regularly from two to three times that of the Senate.

In seventeen states the membership of both Houses is made up of representatives from districts of equal population. In nineteen other states there is a requirement that a locality, either county or town, be represented in one or both Houses. In these states, however, the requirement modifies only slightly the principle of popular representation, and the districts are practically of equal population. In other words, thirty-six of the states make their legislative Houses popular in basis. The nine other states depart from this principle by requiring a disproportionate representation for their rural towns, or counties of small population. The worst offenders in this respect are Delaware, Maryland, Vermont, Connecticut, and Rhode Island.

Limitations on legislatures. Under the national Constitution the powers not delegated to the federation nor prohibited to the states are reserved to the states. This reserved power may be exercised in each state by its legislature, unless the local constitution redelegates parts of this power to the other departments of government, and places restrictions and prohibitions on legislative use of the remainder.

One would think that since our legislators usually come from districts of equal population they would, by constitution, be intrusted with large discretionary powers in legislation. This, however, is far from being the fact. There is a steadily increasing tendency to restrict in every possible way the enormous powers of legislatures. In general the length of a constitution indicates the amount of restriction placed on lawmaking. Every provision in a bill of rights limits by so much legislative initiative. The rapidly increasing powers of the executive and the electorate in appointment, administration, and lawmaking are all at the expense of the assembly; the growth in importance of the constitutional convention subordinates proportionately its rival, the legislature. Every article in the constitution that fixes the organization and powers of a department of administration or division of government, or defines a policy in regard to

important interests, is to that extent a restriction on legislative discretion. Yet in the newer constitutions one may expect to find, as already indicated, lengthy articles on the judicial and administrative departments, and, moreover, much regulation of taxation, finance, local government, education, elections and the suffrage, land, mines, corporate interests, and labor. To these regulations should be added long lists of prohibitions, such as those against special or local legislation, and numerous regulations of procedure in respect to the handling of bills. Subtract all these limitations on legislative powers from the totality, and the question may then well arise whether it will ultimately prove worth while to retain an expensive legislature to exercise its small residue of petty powers. A convention meeting periodically, and well-supervised administrative departments with ordinance powers, might perform all legislative functions with entire satisfaction.

It seems plain that the really important lawmaking body at the present time is the convention. Its members are of a higher grade and turn out work distinctly superior to that of legislatures. These really are bodies having chiefly ordinance powers. Whenever, through sudden changes in conditions, a legislature unexpectedly develops large discretionary power in statute making, the next convention in that state settles the principle itself and thereby adds another limitation to legislative initiative. If this tendency continues, the biennial session will become quadrennial, the term be limited to forty or sixty days, and every inducement offered our legislators to do as little and to adjourn as speedily as possible. On the other hand, if our states can make improvements in the legislative system and select a better grade of legislators, our lawmaking might continue to be intrusted to legislatures whose members, as the early constitutions of Maryland and Vermont put it, should be persons "most wise, sensible, and discreet," and "most noted for wisdom and virtue."

In conclusion, attention may well be called to the practical disappearance from our constitutions of some old-time provisions. Among these may be mentioned the annual election and the annual session, the governor's council, and unequal representation of the people in lawmaking bodies, the life tenure of judges, and the advisory capacity of the supreme court. Religious restrictions on officeholding, and the property qualification for suffrage, with very slight exceptions, have gone; the town system of New England is dying in that section and does not exist outside of it. The real local units of administration now are (1) the rural county with its numerous subdivisions, and (2) the incorporated city, both of which are gaining power throughout the United States.

If general tendencies in the making of constitutions may be condensed into a sentence, we may say that governmental powers are centering into the electorate, which voices itself through the ballot and the convention.

THE CONSTITUTION OF OKLAHOMA[1]

By Charles A. Beard

Mr. Bryce has commended to scholars the study of our state constitutions on account of their historic interest and their value for the science of comparative politics. In them, he urges with good reason, one may read the annals of legislative and political sentiment more easily and more succinctly than in any similar series of laws in any other country.[2] It may be added that these fundamental laws are all the more instructive to the student of practical politics because they contain, in a large measure, the definite rules of law which are steadily being devised to meet concrete problems as social pressures from various directions bring them within the sphere of legislation. In fact, it is highly probable that the political philosopher who considered them in the abstract would go far astray; because they mainly reflect the legal adjustments which have accompanied the material development of our country and are well-nigh meaningless to any one not acquainted with the course of our economic evolution during the past century. From this point of view the constitution of the recently admitted state of Oklahoma possesses a unique interest, for its framers have searched with great assiduity among the fundamental laws and statutes of all the other states for the latest inventions known to American politics, and have worked them into a voluminous treatise on public law, — a mosaic in which the glittering new designs of "advanced democracy" appear side by side with patterns of ancient English make.

I. Structure of the Central Government

In the bold framework of this new government there is little that is novel or striking, and it would be a work of supererogation to describe it in detail. Accordingly we consider only the newer devices which have a special significance in showing the general tendencies in our constitutional development.

In the midst of a movement, commended by the experience of many states,[3] toward an integration of the administrative system into a responsible hierarchy and the centralization of control in the hands of the governor,

[1] From *Political Science Quarterly*, 1909. [2] American Commonwealth, Vol. I, p. 450.

[3] It must be admitted, however, that some of the states are going in the direction of popular election. Governor Blanchard of Louisiana, in his message of May 14, 1906, said: "In my inaugural address I recommended to this general assembly at its first session that action be taken on the line of relegating to the people the filling by popular vote of offices under the state government that were filled by appointment of the governor. Much then was done in this direction. The judges of the supreme court, theretofore appointed by the governor, were made elective. The register of the state land office and the commissioner of agriculture and immigration, theretofore appointive, were made elective the same as other state officers. So also vacancies occurring in the offices of district judge, district attorney, sheriff, and clerk of court, which vacancies when occurring had heretofore been filled by appointment of the governor, are now filled by election of the people at special elections called for the purpose." On the other hand, Governor Hughes of New York, in his 1909 inaugural address, inveighed against the irresponsibility engendered by the decentralized elective system.

Oklahoma has gone almost as far as possible in the other direction. In fact, faith in the check and balance system as a guaranty of efficiency and justice in administration is expressly stated in the article ordering the legislature to provide by law for the establishment and maintenance of "an efficient system of checks and balances between the officers of the executive department, and all commissioners and superintendents and boards of control of state institutions, and all other officers entrusted with the collection, receipt, custody or disbursement of the revenues or moneys of the state whatsoever." In accordance with this scheme of government, not only are the old executive officials — Secretary of State, auditor, attorney-general, and treasurer — elected by popular vote, but also the newer authorities — superintendent of public instruction, insurance commissioner, state examiner of state and county accounts, commissioner of labor, mine inspector, and commissioner of charities. The corporation commission, which in New York is appointed by the governor by and with the advice of the Senate, is composed in Oklahoma of three members elected by the voters of the state for a term of six years, one member going out biennially. Over this decentralized and independent administrative system the governor has only general supervisory power. He must, of course, see that the laws are executed, and he may require information under oath from all the officers and commissioners of the state on any subject relating to the discharge of their public functions; but he has no coercive authority over the chief administrative officers through the disciplinary power of appointment and removal. By way of compensation, however, he is given a term of four years in which to learn that art of control which is unknown to the formal legal methods.[1]

All elective state officers, including the justices of the supreme court, are liable to removal by the process of impeachment "for wilful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude committed while in office."

In determining the number of members which the legislature shall contain, constitution makers in the United States have apparently arrived at no consistent principles. A study of twenty-one states having a population of between one and three millions reveals an average of forty in the Senate and one hundred fifteen in the House.[2] Oklahoma somewhat approaches the average by having forty-four senators and one hundred nine representatives, but when compared with the fifty-one senators and one hundred fifty assemblymen in New York, with a population of over seven millions, the number seems decidedly out of proportion. Following the example set by a majority of the states, biennial election of the members of the lower house is provided[3] and the

[1] Goodnow, Politics and Administration, p. 173.

[2] Dealey, Our State Constitutions, 1907, p. 43.

[3] According to Professor Dealey, three states in 1905 had quadrennial elections for the lower house; Georgia, Massachusetts, New Jersey, New York, Rhode Island, and South Carolina had annual meetings; and all the other states held biennial elections. Ibid. p. 45.

senatorial term is put at four years, one half retiring biennially. Biennial sessions of the legislature are also provided; but to induce the members to confine their operations within a limit of sixty days it is ordered that they shall receive $6 per day during that period and only $2 for each day's attendance thereafter. Accordingly, unless patriotic devotion to lawmaking or some other important considerations are brought to bear, Oklahoma need not be expected to contribute more than her quota to that vast mass of statutes which Judge Parker estimated at 25,000 pages a year.[1] This precise limitation, however, may impose on the legislators that "severe nervous strain" under which it is said Indiana lawmakers labor to complete their necessary work within the sixty-one days prescribed by the constitution.[2]

Except for some important limitations on procedure which will be considered below, the Oklahoma judicial system presents few features of interest. The justices of the supreme court, however, are selected by a rather novel process: the state is divided into five districts; in each district candidates are to be nominated at the primaries by the political parties or by petition; such candidates are voted for by the qualified voters of the state at large, no elector voting for more than one candidate from each district; and the candidates receiving the highest number of votes in the state are, severally, the justices-elect of the particular districts from which they are nominated. In order to expedite judicial business, Oklahoma has not resorted to the drastic device of refusing to pay the justices of the supreme court until they have finally decided the cases before them, — a method now in force in several states,[3] — but it simply orders them to render a written opinion in each case within six months after it has been submitted. This may have the salutary effect of abbreviating the absurdly long opinions which our courts are prone to inflict on the suffering public; at all events it will prove an interesting experiment.[4]

II. Special Restrictions on the Authorities of the State

The crowning restriction on the delegated authorities of the state is the express retention of the lawmaking power in the hands of the voters through a system of initiative and referendum. This newer contrivance of institutional democracy has already found its way into the constitutions of many states; and Oklahoma has followed the example of Oregon so closely that almost the exact words of the amendment adopted in that state in 1902 have been accepted:

[1] *Proceedings of the American Political Science Association*, 1907, p. 105.
[2] Ibid. p. 103.
[3] Dealey, op. cit. p. 41.
[4] It is estimated that there are in America alone over six thousand volumes of decisions, and that from one to two hundred volumes are being added annually (*Proceedings of the American Political Science Association*, 1907, p. 83). Certainly it is time to restrict the loquacity of our law speakers.

The legislative authority of the state shall be vested in a legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact and reject the same at the polls independent of the legislature, and also reserve power at their own option to approve or reject at the polls any act of the legislature.

Even the Oregon requirement as to the title of the bills has been adopted, and the style of all measures is to be, "Be it enacted by the people of the state of Oklahoma"; and further to demonstrate the majesty of the people, the veto power of the governor shall not extend to measures voted on by them.

An ordinary legislative measure may be initiated by 8 per cent of the legal voters and ratified by a simple majority of those voting in the election at which the particular proposition is submitted. The initiation of a constitutional amendment requires 15 per cent of the voters, and goes into force when approved by "a majority of the votes cast thereon." Thus it may happen that a small proportion of the total number of voters may effect a fundamental revolution in the political system of the state. This provision is doubtless based on practical experience — on the popular indifference manifested in many states to proposals referred for approval. If a majority of all the legal voters were required, it might mean the defeat of almost every measure submitted.[1] To prevent the constant use of the initiative by persistent minorities as a means of agitation, it is provided that no measure rejected by popular vote may again be proposed within three years thereafter by less than 25 per cent of the legal voters.

All acts of the legislature, except laws necessary for the immediate preservation of the public peace, health, or safety, must be referred to the people on a petition of 5 per cent of the legal voters, or on the order of the legislature itself. The referendum petition must be filed with the Secretary of State not more than ninety days after the adjournment of the session of the legislature which passed the act in question; and a majority of those voting on the measure is sufficient for approval or rejection. The referendum may be demanded on one or more items or sections or parts as well as on the whole bill; and to give the people time to prepare petitions, no act (except one carrying into effect the initiative and referendum provisions of the constitution or a general appropriation bill) can go into effect until ninety days have elapsed after adjournment, unless in case of emergency. The existence of an

[1] On an amendment submitted to the voters of Kansas in 1906 only 60,000 votes were cast out of a total of 300,000 polled by the candidates for governor. In the same year an amendment to the constitution of Indiana was voted on by only one twelfth of the voters who went to the polls. In the same year in Louisiana several important amendments were adopted by a vote of one sixth of the electorate. (J. W. Garner, in *Proceedings of the American Political Science Association*, 1907, p. 171.) See, however, the large vote polled on referenda in Oregon. (Biennial Report of the Secretary of State, 1907, p. 68a.)

emergency is determined by a two-thirds vote of all the members elected to each House, the governor concurring. When executive disapproval is incurred, declarations of emergency must have a vote of three fourths of the members of each House. As a result, probably, of the experience of South Dakota,[1] emergency acts are expressly limited to such measures as are immediately necessary for the preservation of public health, peace, or safety; and they may not include the granting of franchises or licenses to corporations or individuals to extend for more than one year, nor provisions for the purchase or sale of real estate, nor the renting or incumbrance of real property for more than one year.

Special and local legislation is one of those thorny problems that apparently can neither be solved nor be let alone.[2] In this matter Oklahoma has borrowed from her sister commonwealth of Arkansas the check of publicity. No special or local law can be considered by the legislature until notice of the intended introduction of the proposed bill, stating in substance the contents thereof, is first printed for four consecutive weeks in some weekly newspaper published or having general circulation in the city or county affected by the bill. This requirement seems to insure adequate publicity, and it will probably prevent that surreptitious publication which, as Professor Dealey points out, may very well defeat the operation of an otherwise excellent plan. This general restriction is further supplemented by a long list of particular subjects on which special legislation is forbidden except as otherwise provided.

To secure a wholesome separation of politics from private economy, it is ordered that a member of the legislature who has a personal or private interest in any measure or bill proposed or pending before the legislature must disclose the fact to the House of which he is a member and must not vote thereon. Furthermore, no member, during the term for which he is elected or within two years after its expiration, shall be interested directly or indirectly in any contract with the state, or with a county or subdivision thereof, authorized by any law passed during his time of service. For the species of corruption which this provision aims to prevent, the penalty is expulsion; and expulsion for this cause renders the member forever ineligible for election to either House.

The rule, now approved by the experience of several states, that the general appropriation bill shall contain nothing but appropriations for the expenses of the executive, legislative, and judicial departments of the state and for interest on the public debt,[3] is adopted. Moreover, no revenue bill can be passed during the last five days of the session. From among the variety of expedients designed to limit the taxing power of the legislature,[4] Oklahoma has selected a maximum rate of thirty-one and one-half mills on the dollar and the assessment of all property taxable

[1] State ex rel. Lavin, et al. *vs.* Bacon (1901), 14 S. D. 394. [2] Dealey, op. cit. pp. 51–54.
[3] Reinsch, American Legislatures and Legislative Methods, p. 189.
[4] Agger, The Budget in the American Commonwealths (Columbia Studies), p. 35.

ad valorem on the basis of a fair cash value. Provision is made that the state may select its objects of taxation and levy its revenues independent of the counties, cities, or other municipal subdivisions; but this separation of sources of revenue, which is clearly the tendency in the most advanced commonwealths, is not made obligatory upon the legislature. Lest that inherent power which abides in the legislature should not be deemed sufficient warrant for any radical schemes of taxation that the future may bring forth, it is expressly stipulated that the legislature shall have authority to levy license, franchise, gross revenue, excise and income taxes, collateral and direct inheritance, legacy and succession taxes, graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes, stamp, registration, production, or other specific taxes. The work of equalization is intrusted to a state board composed of the governor, auditor, Secretary of State, attorney-general, state inspector and examiner, and the president of the board of agriculture.

Two very significant limitations on the authorities of the state are embodied in the clauses relating to habeas corpus and injunctions. Defying what seem to be "the plain teachings of history," that summary and drastic powers must occasionally be wielded by some officer of the state, Oklahoma has firmly declared that "the privilege of the writ of habeas corpus shall never be suspended by the authorities of this state." This subordination of military to civil authority in the matter of the great prerogative writ is accompanied by a positive limitation on the power of the judiciary in the granting of injunctions. The legislature, the constitution declares, shall pass laws defining contempts and regulating proceedings and punishments in cases of contempt; but every person accused of violating or disobeying an injunction out of the presence or hearing of the court is to be entitled to trial by jury to determine his guilt or innocence, and in no case shall penalty or punishment be imposed for contempt until the accused has had an opportunity to be heard.

III. Municipal and Local Government

In the attempt to secure for towns and cities a large degree of "home rule," Oklahoma has adopted the system which has been instituted in Missouri, California, Colorado, Washington, and Minnesota, namely, that of allowing certain municipalities to draft their own charters without legislative interference. Any city in Oklahoma containing a population of more than two thousand inhabitants may place the framing of its charter in the hands of a board of freeholders elected by the qualified voters of the place; and the document drafted by this municipal convention, when ratified by popular vote and approved by the governor, becomes the organic law of the city. Amendments to the charter may be made by the processes of initiative and referendum described in the next paragraph, but these also require the approval of the governor. The municipal

charter is, of course, subject to the constitution and laws of the state; and the courts, when called upon to adjust conflicts over state and municipal functions, will find numerous precedents for their guidance in the experiences of other states where this mode of charter enactment is in force.[1]

Not only do the voters of the municipality control their own charter-making, they retain supervisory powers over their agents by means of the initiative and referendum. Petitions initiating municipal measures or requiring referenda must be signed by 25 per cent of the number of persons who voted at the election just preceding. If the petition demands the enactment of an ordinance or a legal act other than the grant, extension, or renewal of a franchise, it is presented to the municipal council, and, if approved there, becomes law without further reference to the voters. If it is rejected by the council, it must be referred to the voters, and will go into effect if approved by the majority of those who vote thereon.

This popular supervision is developed to the highest degree in the matter of franchises. No municipal corporation can grant, extend, or renew a franchise without submitting the measure to the people, and the proposed measure must receive the approval of a majority of the qualified voters residing within the corporate limits. Furthermore, the definite term of twenty-five years is fixed for all such grants, renewals, or extensions, and every municipal corporation in the state is given the right to undertake any business or enterprise which may be engaged in by any person, firm, or corporation by virtue of a franchise from the city. No exclusive franchises can be granted, and the power to regulate the use and enjoyment of franchises, as well as the charges made for public services, is expressly retained.

In the sections relating to local government, the point of special interest is the extension of the principle of the initiative and referendum to the county and its subdivisions, as regards all local ordinances.

IV. Provisions relating to Corporations and Labor

The spirit of fierce opposition to monopolies and that jealousy of large business enterprises which have filled the statute books of western states with drastic measures, appear in almost every article of the Oklahoma constitution. In the Bill of Rights, perpetuities and monopolies are declared to be contrary to the genius of a free government, and corporations are excluded from several of the privileges and immunities secured to natural persons. Remembering, doubtless, that many men, eminent for their administrative capacities, are prone to forget business cares in the presence of investigating committees, the framers of Oklahoma's fundamental law have provided for unrestricted searches into the actual transactions of corporations by explicitly stating that the records, books, and files of

[1] Goodnow, City Government in the United States, p. 93.

all corporations shall be at all times subject to the full visitorial and inquisitorial powers of the state, notwithstanding the rights secured to persons and to citizens. And to refresh the memory of witnesses, it is ordered that no person having knowledge of facts tending to establish the guilt of any other person or corporation charged with an offense against the laws of the state shall be excused from presenting it on the ground that it might incriminate himself; but immunity from prosecution and punishment is guaranteed to persons so testifying. Lest the legislature should perchance overlook the matter, it is expressly ordered to enact laws defining unlawful combinations, monopolies, trusts, and acts and agreements in restraint of trade, and to provide for the punishment of offenders.

The realization of these policies is, however, by no means left to the uncontrolled devices of the legislature. The constitution creates a corporation commission, composed of three members elected for terms of six years by popular vote, one of them retiring every two years. In all matters pertaining to the public visitation, regulation, or control of corporations and within its jurisdiction, the commission has the powers and authority of a court of record, and may administer oaths and compel the attendance of witnesses and the production of papers. It may punish for contempt any person guilty of disorderly or disrespectful conduct in its presence, and may enforce compliance with its lawful orders and requirements by imposing fines and penalties provided by law — always after affording due process to the party or parties affected.

The powers of the commission leave nothing to be added. It is charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business within the state, in all matters relating to the performance of their public duties and their charges therefor. It is also to correct abuses and to prevent unjust discrimination and extortion by such companies; and, in order to fulfill its general purposes, it is instructed to prescribe and enforce, against the various concerns coming within its supervision, reasonable and just rates, charges, classifications, rules, regulations, and requirements.

Ample provision is made for collection of the information concerning the business of the companies which may be required in the discharge of the obligations imposed upon the commission. It is empowered, at all times, to inspect the books and papers of transportation and transmission companies doing business within the state, and, furthermore, to require such companies from time to time to make special reports under oath concerning their affairs. The commission is instructed to keep itself fully informed on the physical condition of all the railroads of the state and the manner in which they are operated, with reference to the security and accommodation of the public; and it must take measures "to prevent unjust or unreasonable discrimination and extortion in favor of or against any person, locality, community, connecting line, or kind of traffic, in the

matter of car service, train or boat schedule, efficiency of transportation or transmission." In the exercise of this enormous supervisory power, the commission is controlled by elaborate provisions requiring due process in the matter of notice, hearing, and appeal to the courts.

Not content with prescribing general regulations for the commission and leaving the rest to the legislature, the framers of the constitution have embodied in the fundamental law many express provisions controlling matters of detail. In the first place, they have ordered that the whole physical structure of the railway and public-service business shall be laid bare — one is tempted to say, naked — before the public. The commission must ascertain and keep as a matter of public record the amount of money expended in the construction and equipment per mile of every railroad and public-service corporation in Oklahoma, the amount of money expended to secure the right of way, and, furthermore, the amount of money it would require to reconstruct the road bed, track, depots, and transportation facilities, and to replace all the physical properties belonging to the railroad or public-service corporation. The commission must also ascertain the outstanding bonds, debentures, and indebtedness, and the amount thereof; when issued and the rate of interest; when due; for what purposes issued; how used; to whom issued; to whom sold, and the price in cash, property, or labor (if any) received therefor; what became of the proceeds; by whom the indebtedness is held, and the amount purporting to be due thereon; the floating indebtedness of the company, to whom due, and the residence of the creditor; the credits due on it; the property on hand; and, finally, the judicial or other sales of the said road, its property, or franchises, and the amounts purporting to be paid therefor. After having thoroughly analyzed the physical structure of the system, the commission must ascertain the salaries and wages paid by the railroads and public-service corporations.

The present status of railway and public-service corporations is thus to be carefully and minutely described. and then the future is to be safeguarded. It is expressly ordered that no corporation shall issue stock except for money, labor done, or property actually received to the amount of its par value; all fictitious issues of stock or indebtedness are void; stock and bonded indebtedness shall not be increased except in accordance with the general law and with the consent of the persons holding the larger amount in value of the stock duly obtained at a meeting held after thirty days' notice. Each railway and public-service corporation doing business in the state must, in addition, maintain a public office where its business shall be transacted, stock transfers recorded, with the amount paid and the names of the owners, and books kept showing the assets and liabilities of the concern. The directors of such corporations must meet annually after due notice and make reports as required by law.

After ordering physical valuation and prescribing these rules designed

to prevent stock-watering, the Oklahoma constitution makers lay down some very particular regulations concerning the management and conduct of corporate business. In the first place, there are to be no mergers in the state, except under specific conditions. No public-service corporation can consolidate its stock, property, or franchises with, or lease or purchase the works or franchises of, or in any other way control any other public-service corporation owning or having under its control a competing or parallel line, except by legislative enactment upon recommendation of the corporation commission. Furthermore, the legislature is expressly forbidden to authorize such consolidations with corporations organized under the laws of other states or the United States and holding or controlling competing lines in Oklahoma. No railway, transportation, or transmission corporation can under any circumstances consolidate with concerns organized out of the state.

Turning to corporations in general, the constitution provides that no corporation chartered or licensed to do business in the state shall hold, own, or control in any manner whatever the stock of any competitive corporation or corporations engaged in the same kind of business in or out of the state, except such stock as may be pledged in good faith to secure bona fide indebtedness, and in such cases the said stock must be sold within twelve months. In fact, the competitive system is to be maintained in every field of business; for, until otherwise provided by law, no person, firm, association, or corporation engaged in the production, manufacture, or sale of any commodity of general use may attempt to destroy competition or create a monopoly by discriminating between persons, associations, corporations, different sections, communities, or cities of the state, or by selling lower under some circumstances than others, due allowance being made for cost of transportation and difference in grade and quantity.

Though competition is to be upheld in the railway business, its full consequences are not to be accepted. A flat rate of two cents a mile for carrying passengers is imposed until otherwise provided by law, subject to the reservation that the corporation commission may exempt any railroad from the operation of this restriction if it can be shown that a just compensation cannot be earned under it. Moreover, coöperation among competing concerns, subject to state supervision, is made mandatory. Every railroad, oil-pipe, car, express, telephone, or telegraph corporation or association authorized to do a transportation or transmission business within the state shall have the right to intersect, connect with, or cross any other road or line. All railroad, car, or express companies must receive and transport one another's cars, tonnage, or passengers, without delay or discrimination, under the supervision of the corporation commission. All telephone and telegraph lines, operated for hire, shall receive and transmit one another's messages and make physical connections under the rules prescribed by law.

And finally there is inserted a clause whose requirements will cause readjustments as far away as New Jersey. No corporation, foreign or domestic, can do business within the state without first filing with the corporation commission a list of its stockholders, officers, and directors, with the residence and post-office address of each and the amount of stock held by each. And every foreign corporation, before being licensed to do business, must designate an agent residing in the state on whom summons or other legal notice may be served. No foreign insurance company may receive a license or do business within the state until it has complied with the laws of the state and has deposited such collateral or indemnity for the protection of its patrons within the commonwealth as may be prescribed by the legislature. It must also agree to pay the taxes and fees imposed by law.

The farmers are to be specially protected from the real-estate corporations by a unique process. No corporation may be created or licensed in the state for the purpose of dealing in real estate other than that located in incorporated towns and cities or additions thereto. Corporations in general are not precluded from acquiring titles by the foreclosure of mortgages, but they must dispose of property so acquired within a period of seven years. Public-service corporations may not hold any land except such as is indispensable to the transaction of their necessary business.

The familiar claims of labor are met in the spirit of the motto inscribed upon the seal of the state, — *Labor omnia vincit.* Eight hours shall constitute a day's work in all cases of employment by and on behalf of the state or any county or municipality, — a provision which extends the eight-hour rule to workmen employed by contractors in the service of the government, state and local. The contracting of convict labor is prohibited. The use of the injunction, as remarked above, is carefully restricted; and the common-law doctrine of the fellow servant, so far as it affects the liability of the master for injuries to his servant resulting from acts or omissions of any other servant or servants of the common master, is abrogated as to every employee of every railroad company, street railway company, interurban railway company, and of every person, firm, or corporation engaged in mining in the state. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact for the jury. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall never be subjected to statutory limitations. No rights under the constitution can ever be waived by contract, express or implied.

The constitution creates a department of labor, headed by a commissioner elected for a term of four years by popular vote. It also commands the legislature to establish a board of arbitration and conciliation in the department of labor, with the commissioner at its head. The general conditions of industrial arbitration are left to the discretion of the legislature,

except that every license or charter granted to a mining or public-service corporation, foreign or domestic, shall contain a stipulation to the effect that such corporation will submit to arbitration differences with its employees in reference to labor.

The legislature is ordered to pass laws to protect the health and safety of employees in factories, in mines, and on railroads. Two clauses are added on the subject of child and woman labor. The employment of children in any occupation injurious to health and morals, or especially hazardous to life or limb, is prohibited. Boys under sixteen and women and girls are prevented from working underground in the mines. Following the well-established precedents of other states, it is provided that eight hours shall constitute a day's work in all mines within the state.

V. Miscellaneous

Lest the Oklahoma lawmakers should not prove amenable to the growing pressure of public opinion, which has so recently placed elaborate primary laws upon the statute books of Wisconsin, Illinois, Kansas, New Jersey, and many other states, the constitution makes it mandatory upon the legislature to enact laws creating a compulsory primary system, which shall provide for the nomination of all candidates in all elections for state, district, county, and municipal officers, including United States senators, and which shall apply to all political parties, reserving of course to the people the right to name nonpartisan candidates by petition. The completion of the plan for popular election is left to the legislature. All corporations organized or doing business within the state are forbidden to influence elections or official duty by the contribution of money or anything of value.

Both in the Bill of Rights and in the body of the constitution there are several departures from the traditional Anglo-Saxon legal doctrines; but most if not all find precedents in the newer constitutions of other states and thereby fall in with certain general tendencies in American legal evolution. Prosecution for felony and misdemeanor by information as well as by indictment is expressly sanctioned; but no one may be prosecuted by information for felony without having first had a preliminary hearing before an examining magistrate or having waived such hearing. When the grand jury is employed, the concurrence of nine men out of twelve is sufficient for the return of a true bill. In county courts and courts not of record the petty jury shall consist of six men; and in civil cases and criminal cases involving crimes less than felonies three fourths of the whole number of jurors may render a verdict. The provision relating to criminal libel is the same as that contained in the constitutions of the more conservative states, for example in that of New York. In all criminal prosecutions for libel, the truth of the matter alleged to be libelous may be given in evidence to the jury, and if it appear to the jury

that the matter charged as libelous is true or was written with good motives and for justifiable ends, the party shall be acquitted. The rule of law that a person is not required to give evidence tending to incriminate himself when testifying against any other person or corporation is abrogated, and the "immunity bath" is substituted, as has been pointed out above. Likewise the common-law doctrine of the fellow servant has been set aside in certain cases mentioned above, and the defense of contributory negligence is declared to be a question of fact to be submitted to the jury.

The Oklahoma constitution does not show quite that "wholesome anxiety to protect and safeguard private property in every way" which Mr. Bryce observed as one of the excellent features in American constitutional development. It is true that it contains express provision that "private property shall not be taken or damaged for public use without just compensation"; but at the same time it declares that "the right of the state to engage in any occupation or business for public purposes shall not be denied or prohibited, except that the state shall not engage in agriculture for any other than educational and scientific purposes and for the support of its penal, charitable, and educational institutions,"— an exception clearly bucolic in its origin. Also every municipal corporation, as has been indicated, may engage in any business or enterprise which might be carried on privately under a franchise from the city. In case the state should engage in business on such a large scale as to destroy the enterprises of private persons, would claims for compensation lie against it, or would the Oklahoma courts extend to the body politic that principle laid down by the English courts with reference to private corporations, namely that damages are not recoverable for injury done in the ordinary course of competition?[1]

There are also evidences of that philanthropy and humanitarianism which Mr. Bryce declared to be mingled in our state politics with folly and jobbery "like threads of gold and silver woven across the warp of dirty sacking." Educational and reformatory institutions, those for the benefit of the insane, blind, deaf and mute, and such other institutions as "the public good may require," are to be established and supported by law. The creation of a system of free schools and compulsory education in the common branches is made obligatory on the legislature. The manufacture and sale of liquor as a beverage are forbidden. There is a generous exemption of homesteads from forced sales, except for the payment of purchase money, improvement charges, taxes, and mortgages. The legal rate of interest in the absence of contract is fixed at 6 per cent, and the maximum rate is placed at 10 per cent. Laws are to be enacted, as pointed out above, for the protection of the health of employees in mines, factories, and on railways, and for the protection of women and children in industries. It is not only the state that assumes

[1] Webb, Industrial Democracy (edition of 1902), p. xxix.

humanitarian obligations; the several counties shall provide, under the general prescriptions of the law, "for those inhabitants who, by reason of age, infirmity, or misfortune, have claims upon the sympathy and aid of the county."

Two or three clauses set us to wondering whether Oklahoma imagines that Calhoun is still alive. The first section of the first article declares that "the state of Oklahoma is an inseparable part of the Federal Union," as if some Buchanan in the President's chair at Washington might forget it in case of an incipient movement for secession.[1] In the same section it is expressly acknowledged that the "Constitution of the United States is the supreme law of the land"; but treaties and laws made in accordance with that Constitution are omitted. Perhaps because Congress is seen to be dilatory in enforcing the suffrage section of the Fourteenth Amendment (the Republican platform of 1904 notwithstanding), Oklahoma includes in her constitution the Fifteenth Amendment. The article regulating corporations is expressly restricted in its application so as not to conflict with any of the provisions of the Constitution of the United States; the obligation of contract shall not be impaired, and due process must run everywhere throughout the state. Finally, in reserving to the people the right to alter this constitution in the future, Section 1 of the Bill of Rights warns them that such changes as may be made must not be repugnant to the fundamental law of the United States.

In its provisions for amendment, the Oklahoma constitution seems to comply in general with the canons recently laid down by Professor Garner in a careful comparative study.[2] It provides in the first place for the two ordinary methods of change,—for revision in state convention and for specific alterations by legislative reference to popular vote; and it adds a third expedient,—amendment by popular vote on an initiative petition. A constitutional convention may be called by the legislature only with popular approval on a referendum vote, but the question whether a convention shall be called must be submitted to the people at least once in twenty years. Furthermore, all revisions made in convention must be ratified by popular vote. The legislature may also initiate an amendment by a simple majority vote of both Houses; the proposition then goes to the people at a general election, or, if two thirds of each House concur, at a special election, where a majority of those voting is

1 Similar provisions, however, are contained in a large number of state constitutions. See the interesting debate in the New York Convention of 1894 over the proposal to insert a section acknowledging the supremacy of the Constitution, laws, and treaties of the United States. Revised Record of the Constitutional Convention of 1894, Vol. I, pp. 1037 et seq.

2 *Political Science Review*, Vol. I, No. 2, pp. 213–247. Oklahoma has fallen into what Professor Garner regards as the error of not making exact provisions for the composition and procedure of future constitutional conventions. Its brief mention should be compared with the elaborate details laid down in Article XIV, Section 2, of the New York constitution. However, with the initiative and referendum and easy legislative reference there will probably be no early need for a convention in Oklahoma. In fact, the constitution seems to anticipate about everything that may happen within a reasonable time.

sufficient to ratify. Amendments may also be initiated by 15 per cent of the legal voters, and, when ratified by a majority of the people voting thereon, they become a part of the fundamental law of the state.

This remarkable political document has been rather severely criticized in many quarters on the ground that it is a radical departure from American principles and practice. One New York newspaper, desiring to cast reflections upon Great Britain for adopting an old-age pension system, declared that "the mother of parliaments" had sunk to the level of this new western state. The Oklahoma constitution, however, has not surprised any one who has been following the tendencies of American state legislation for the last three decades; it is by no means "a leap in the dark" or "a shooting of Niagara." The American people are not given to sailing the ship of state by the stars or to deducing rules of law from abstract notions; and every important clause of the Oklahoma constitution has been tried out in the experience of one or more of the older commonwealths. The initiative and referendum came from Oregon and find warrant in the laws of several other states;[1] direct nomination is fast working a revolution in the American party system after a generation of tentative experiments built upon earlier voluntary methods;[2] the departures from old legal practices, even in such important matters as the injunction, find many precedents; the provisions regarding corporations are gathered from the constitutions and statutes of states as far apart as New York and Texas; and the labor provisions are not new to students of social economy.

[1] *Political Science Quarterly*, Vol. XXIII (December, 1908), pp. 577 et seq.
[2] Merriam, Primary Elections (1908).

BIBLIOGRAPHICAL NOTE

By William L. Bailey

State publication and bibliography are in a much less developed condition than that of the national government. It is only, however, quite recently that the enormous activity of the Government Printing Office has been rendered entirely useful. Doubtless it is true that a large proportion of state publications are not of general interest outside of, or, indeed, within the state; but it has so often been pointed out that as a result of our federal system, one state desiring to experiment in legislation or administration may profit by the experiences of other states in the same matter, that from the merely practical point of view more extensive publication and bibliography of state documents would be desirable. This localism has probably been of some effect in making so large a mass of the state publications consist of perfunctory or sheerly administrative reports. There is, however, in these a quite surprising wealth of material valuable to not only political science but to the economist, sociologist, and natural scientist as well. In fact, one is sometimes led to think that there might even be curtailment along the line of publication by the state of documents wholly of an unpolitical nature. There is a wide range of governmental activities of the state governments whose official records are not yet published, and are thus inaccessible to outside interest. State publications are being rendered more available since 1895 by the reinvigoration of the various state libraries through the organization of the National Association of State Libraries, in affiliation with the American Library Association. This is associated with the general reawakening of interest in state governments, and the desire for increased uniformity in state action.

A provisional list of the official publications of the several states from their organization has been published under the editorial direction of Mr. R. R. Bowker, from the office of the *Publishers' Weekly*, New York, 1908, under the title "State Publications." It has appeared in four parts: Part I, on the New England States, appearing in 1899; Part II, for the North Central States, 1902; Part III, the Western States and Territories, 1905; and Part IV, in 1908, for the Southern States. This was the outcome of an earlier list of state publications, in the *American Catalogue*, 1884–1890, and continued in the volume of 1890–1895. When "State Publications" appeared the bibliography of state documents was almost nil. Mr. Bowker's volumes serve simply as a check list, and as such are more useful to the librarian and bibliophile than to the student or inquirer. They have not been supplemented since publication, nor has the gap to date been bridged by any other single published index or check list. Since January, 1910, however, there has been published by the Library of Congress a monthly list of state publications. The materials appearing in the interval can only be traced in the scarcely satisfactory catalogues of the various state libraries.

A number of bibliographies have also been compiled, covering the publications of the several states in special fields. The most notable contribution in this field is Miss Hasse's monumental "Index to Economic Material in Documents of the States of the United States" (1907). But Miss Hasse omitted constitutions, laws, legislative journals, and court reports. Various departments and offices of the national government have also undertaken the indexing, and even in some cases the digesting, of the contents of state publications along specific lines. The activity of the Bureau of Labor has been greatest along this line. In 1892 there appeared as the third special report of that office an analytical abstract and index of the labor bureau reports of each state down to that date. This has been brought down to date in editions of 1896, 1902, being in 1904 supplemented by digests of all decisions of the courts relating thereto. Lists of publications of the several states relative to health boards, hospitals, and the defective classes are to be found in the catalogue of the Library of the Surgeon-General's Office, initiated by Dr. J. S. Billings.

There is no such source of information as the much derided *Congressional Record* furnishes for the study of the national legislature. The legislative journals of the various states are chiefly useful for analytical study of legislatures, containing as they do the barest account of the formal proceedings. In some cases there are appended to the journals copies of the messages of the governors. The debates of the state legislatures are in no case officially published, and the newspaper reports are both partial and partisan. Committee proceedings are published only in the case of very important investigating committees, such as the Armstrong Insurance Investigating Committee of New York.

The state constitutions have been quite thoroughly covered. The most recent and complete collection of state constitutions is found in F. N. Thorpe, "Federal and State Constitutions," 7 vols. (Washington, 1909, Government Printing Office). This has a valuable bibliography of constitutions prefixed. Another collection is that of B. P. Poore, "Charters and Constitutions," 2 vols., 1877, containing the texts of most of the charters and constitutions, from 1600 to 1878. The constitutions of the states as existing in 1894 are found in the "New York Constitutional Convention Manual," 2 vols., 1894. A digest of excerpts of the various constitutions was prepared by the Michigan Legislative Reference Bureau in 1907, for the use of the constitutional convention of that year, and constitutes a valuable source of knowledge of the exact constitutional provisions of the states upon a series of given topics. A comparative digest of state constitutions is furnished by F. J. Stimson, "Federal and State Constitutions" (Boston, 1908), as also for the date 1887 in the same authors, "American Statute Law," Vol. I, pp. 1–114. A brief historical statement of the main tendencies in the development of state constitutions down to 1887 is found in H. Hitchcock, "American State Constitutions." Constitutions of individual states are usually prefixed to their volumes of statutes, as also contained in their registers or manuals, and in the most of the states are separately published for distribution.

A valuable bibliography of state constitutions is prefixed to Thorpe's edition of the constitutions. It indicates the fact that only in a very limited number of cases have the debates of the constitutional conventions been published. The journals, however, furnish valuable material for a comparative study of constitution-making, past and present. In few of the debates is there material that

rises above localism and partisanship, but in the proceedings of the New York convention of 1894, the Michigan convention of 1907, and a few others there are contained valuable records of experiences with political organization and institutions.

Of legal treatises upon the constitutional nature of the American state, Cooley's "Constitutional Limitations" still remains the best account, though rendered slightly less useful by recent developments.

The regular messages of the governors are in only a small number of cases of real value. They usually contain merely very brief summaries of the contents of the reports of departments and institutions. The recent suggestion of Governor Hadley, of Missouri, to dispense with the traditional message from the governor and in lieu thereof have the various officers of the administration acquaint the legislature of the progress and needs of their work is interesting in this connection. The regular messages are chiefly useful as a genuine reflex of the weakness of the American state governor unless he be a strong personality. The art of control of the administrative organization of our states to which the governor is forced under our disintegrated systems is the real index to his position. It has been made the object of careful study by Dr. Barnett in his "Indirect Administration of Wisconsin." But in the states where forceful and statesmanlike governors have been a real power — La Follette in Wisconsin, Hughes in New York, Russell in Massachusetts, Folk in Missouri, to mention only a few — the messages are frequently real contributions to the science of government. The special messages and vetoes are more frequently indicative of personality and of real impress upon the governmental process. In many cases, too, they throw, when analyzed, considerable light upon legislative methods and conditions.

The messages of the governors — regular, special, and vetoes — have been digested by the New York State Library since 1901, in its annual Digest of Governors' Messages. The local state press prints the regular messages *in extenso*. They are also frequently found in the legislative journals. The edition of the New York governors ("Messages from the Governors," 11 vols. to 1906, edited by Charles Z. Lincoln) contains footnotes indicating in each case the outcome in legislation of the recommendations of the various governors, and their vetoes. In a few cases only have the papers of the governors relating to pardons, appointments, and the like been published. The messages and papers of many of the New York governors have been so published, and B. F. Shambaugh has edited an edition for the governors of Iowa to 1902 (7 vols., 1903). The executive acts of the governors are frequently reported by the secretaries of state in their regular reports. Pennsylvania publishes separately the veto messages of the governors.

The reports of the administrative heads and departments are too frequently merely statistical, or administrative in the narrowest sense. The organization of the state executive and the functions of the various officers differ sufficiently to make the task of indicating what in general they severally contain somewhat difficult. The reports of the secretaries of state contain generally the official canvass of state elections; frequently a directory of state and local officers (in some cases going back to the organization of the state), indicating salaries; less seldom a list of the governors' vetoes, and of municipal incorporations; where they act as state auditors, the usual financial reports are found. The contents of the reports of the other offices are sufficiently indicated by the name of the office, their

functions in the various states being fairly uniform. The reports of the attorney-generals frequently contain valuable statements of the legal relations of state officers and the scope of their powers.

Directories of the state and, also, the local governments are furnished by the long list of manuals, registers, and blue books published by the states. These are of varying contents and value. They contain primarily gazetteer information, biographies of legislators and state and local officers, and thus supply the data for a study of representation in state legislators, reëlections in the various offices, and salaries. Very frequently, also, they contain the official canvass of elections made by the Secretary of State; and the party platforms. They impliedly convey that necessary body of statistical and general knowledge of the state which will be of most use to the legislator or state official in discharging the duties of his office. The rules of the legislative bodies, the lists of committees and information of this sort are frequently published in a small manual for pocket use by the legislators.

Defective publicity in relation to state legislators through the lack of such a document as the *Congressional Record* has brought into existence in at least one state, namely, Illinois, the Legislative Voters' League. The bulletins of this organization are keen, critical accounts of conditions and methods in legislatures which are valid for other states than the one in which they originate.

In the field of comparative state legislation much has been done by the activities and publications of the various legislative reference libraries. Their publications have been chiefly along the line of comparative studies of constitutional provisions and legislation on topics which had appeared as problems locally. The various bulletins of the Wisconsin Library are illustrative of this class. The New York State Library Bulletins of Legislation (1891 to date) are the most valuable of such guides to comparative legislation by the states. These appear annually, and are a complete topical digest of all such legislation. The brief digests of the laws are supplemented by "Reviews of Legislation," in the same volumes, written by experts each in his special line.

The annual presidential addresses of the American Bar Association contain a more or less complete review of important additions to the body of state statute law. Committees of the American and the various State Bar Associations are from time to time detailed to investigate specific phases of legislation with a need to greater uniformity or to action within a given state. Only in a limited number of cases, however, have the reports of these committees been printed in full, but summarized results of their findings, frequently of much value, can be found in the regular volumes of proceedings.

Jones's "Index to Legal Periodicals" (2 vols. to 1899) serves as an index to not only the proceedings of the bar associations, but also to the several law journals, which frequently contain articles on specific phases of legislation or on the courts.

F. J. Stimson's "American Statute Law" (2 vols., 1887) is a comparative digest of the then existing body of state legislation, but has not been brought down to date.

Various departments of the national government — the Agricultural Department, the Bureau of Labor, the Commissioner of Education and the Public Roads Office — have published summaries of the legislation of the states on special fields. Indexes to such publications are found in the bulletins of public documents issued by the Superintendent of Documents.

For secondary sources the volumes of the American State Series take first rank as studies of both the law and the practice of every main aspect of state government. They are the product of the newer viewpoint in the study of governments which does not fail to realize the divergence of the actual from the legal, or the importance of bearing in mind the economic and social environment of political institutions. These volumes cover not only the state governments but also the national and local. They consist of "The American Constitutional System," by W. W. Willoughby; "City Government in the United States," by F. J. Goodnow; "Party Organization and Machinery," by Jesse Macy; "The American Executive and Executive Methods," by J. H. Finley; "American Legislatures and Legislative Methods," by Paul S. Reinsch; "Local Government in Counties, Townships, and Villages," by J. A. Fairlie; and "The American Judiciary," by S. E. Baldwin.

"The American Commonwealth," by James Bryce (new and revised edition, 1910), pp. 411–584, still remains the best of general accounts of state government. Less valuable summary accounts are contained in R. L. Ashley, "The American Federal State" (New York, 1902), chaps. xviii and xix; A. B. Hart, "Actual Government" (1903); J. Fiske, "Civil Government in the United States" (1891).

Several studies of individual states, with historical introductions, are to be found in the many editions of school textbooks on civics which have appeared. These often furnish a convenient and reliable source of reference, but are based quite exclusively on constitutions. The American Commonwealth Series is illustrative of this class of material. There is a partial list of such texts appended to Fairlie's "Local Government." The Columbia University Studies on the centralizing movement in several of the states and on certain specific phases are of monographic completeness.

On several administrative problems of the state governments the departments or offices of the national government concerned make valuable reports. The activities of the Commissioner of Education, the office of Public Roads, and the United States Bureau of Labor have already been mentioned. The United States Civil Service Commission has since 1898 chronicled the progress in the states and local governments of civil service reform. The Fifteenth Report (1897–1898) contains a historical statement and bibliography.

On other phases relating to charities and corrections such organizations as the National Conference of Charities and Corrections, the various state conferences, and the National Prison Association issue reports containing material which records state legislation and administrative action. So for the highway problem, the many organizations and conferences, such as the International Good Roads Congress, the National Road Parliament, National Good Roads Convention, National League for Good Roads and state conventions; for education, the National Educational Association, Department of Superintendence; for Civil Service Reform, the National Civil Service Reform League (1874 to date). The trade associations and organizations, such as the American Live Stock Association, American Pharmaceutical Association, and the like, have active committees on legislation, whose reports to their respective bodies are frequently useful for tracing out legislative projects along certain lines. Governmental action must always be understood as not springing full-blown from the head of the sovereign state, but as simply the last stage of a process whose origins are in the many organized interests of economic and social life.

The reports of the proceedings of the various interstate departmental officers' associations contain valuable comparative information as to departmental problems and methods. The Journal of Proceedings of the International Association of Factory Inspectors of America has been published since 1900. The National Association of Railway Commissioners, whose membership includes state and territorial railroad commissioners and members of the United States Interstate Commerce Commission, has published its proceedings since 1889. The first conference of the chief school officers of the several states and territories with the United States Bureau of Education was held in Washington, D.C., February, 1908. Various organizations interested in taxation meet and publish their proceedings, for example, the Bulletin of the International Tax Association (Columbus, Ohio, 1907); the Addresses and Proceedings of the Annual Conferences of the International Association on State and Local Taxation; the Proceedings of the National Conference on Taxation, 1901 to date. The Highway Engineers and Commissioners meet in conventions, as indicated above, and the discussions of comparative methods and progress are published.

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